[HIGH COURT OF AUSTRALIA.]

FEDERAL COUNCIL OF THE BRITISH MEDICAL ASSOCIATION IN AUSTRALIA AND OTHERS . . . } PLAINTIFFS;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

H. C. OF A. 1949.

SYDNEY, *Aug.* 10-12.

MELBOURNE, *Oct.* 7.

Latham C.J., Rich, Dixon, McTiernan, Williams and Webb JJ.

Constitutional Law (*Cth.*)—*Powers of Commonwealth Parliament*—"*Provision of . . . pharmaceutical, sickness and hospital benefits, medical and dental services* (*but not so as to authorize any form of civil conscription*) . . ."—"*Provision*" *of benefits and services*—"*Civil conscription*"—*Provision of free pharmaceutical benefits*—*Effect of statute*—*Medical practitioners compelled to write practically all prescriptions on Commonwealth forms*—"*Medical service*"—*Validity of statute*—*The Constitution* (63 & 64 *Vict. c.* 12), *ss.* 51 (xxiiiA.), (xxxi.), (xxxix.), 77 (iii.)—*Pharmaceutical Benefits Act* 1947-1949 (*No.* 33 *of* 1947—*No.* 26 *of* 1949), *ss.* 4 (2), 6, 7, 7A, 8, 11-14, 20 (1) (*c*), 21, 23—*Pharmaceutical Benefits Regulations* (*S.R.* 1948 *No.* 56—1949 *No.* 44).

The *Pharmaceutical Benefits Act* 1947-1949 establishes a scheme under which members of the public are entitled on compliance with certain conditions to obtain free of charge the medicines specified in a formulary and the appliances specified in an addendum. One of the conditions of entitlement is that the medicine or appliance must be prescribed by a medical practitioner on a prescription form supplied by the Commonwealth. Section 7A of the Act provides that a medical practitioner shall not write a prescription in respect of medicines in the formulary or appliances in the addendum otherwise than on a prescription form supplied by the Commonwealth and imposes a penalty for non-compliance. The plaintiffs alleged in their statement of claim that the formulary and addendum contained a large number of medicines and appliances ordinarily prescribed by medical practitioners who could not carry on the practice of their profession without prescribing such medicines and appliances. Upon a demurrer,

Held, by *Latham* C.J., *Rich*, *Williams* and *Webb* JJ. (*Dixon* and *McTiernan* JJ. dissenting), that s. 7A imposed a form of civil conscription within the meaning of s. 51 (xxiiiA.) of the Constitution and, therefore, was invalid.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Held, by *Rich*, *Dixon*, *McTiernan* and *Williams* JJ. (*Latham* C.J. dissenting) that the prohibition in s. 51 (xxiiiA.) of the Constitution " but not so as to authorize any form of civil conscription " applies only to medical and dental services.

Held, by *Latham* C.J., *Rich*, *Dixon*, *McTiernan* and *Webb* JJ. that the power conferred by s. 51 (xxiiiA.) of the Constitution to legislate with respect to the provision of allowances, benefits, pensions &c. is limited to the provision of those matters by the Commonwealth.

" Civil conscription " discussed.

DEMURRER.

The Federal Council of the British Medical Association in Australia, Thomas Ernest Victor Hurley, Archibald John Collins, Herbert Ronald Robinson Grieve, Henry Cecil Colville, John Edward Ferdinand Deakin and John O'Brien, medical practitioners, commenced an action in the High Court against the Commonwealth, Dr. Arthur John Metcalfe and Nicholas Edward McKenna.

The statement of claim alleged that the Royal Assent was signified on 12th June 1947, to an Act of the Commonwealth Parliament entitled the *Pharmaceutical Benefits Act* 1947, and on 25th March 1949 to an Act of that Parliament (the Bill for which was first introduced into that Parliament in the Senate on 10th March 1949) entitled the *Pharmaceutical Benefits Act* 1949, and on 7th July 1949 to an Act of that Parliament entitled the *Pharmaceutical Benefits Act* (*No.* 2) 1949; by s. 3 of the last-mentioned Act s. 7A of the Act of 1947 as amended by the Act of 1949, was repealed and a new s. 7A was inserted in lieu thereof, and it was provided that the new s. 7A should come into operation on a date to be fixed by proclamation; this date was fixed on 7th July 1949 as 25th July 1949; that regulations purporting to have been made under the said Acts were notified in the Government *Gazette* on 10th May 1948, 9th December 1948 and 8th July 1949 respectively; copies of the Act and regulations were annexed to the statement of claim; the plaintiff association was a body corporate incorporated under the laws of New South Wales, one of its objects, as shown by its memorandum and articles of association annexed, was to advance the general interests of the medical profession in Australia; the plaintiffs Collins, Grieve, Deakin and O'Brien were doctors resident and practising the profession of medicine in New South Wales, the plaintiffs Hurley and Colville were doctors resident and practising the profession of medicine in Victoria; Hurley and Collins were respectively the president and vice-president and Grieve and Colville were members

of the association; the defendant Metcalfe was the Director-General of Health of the Commonwealth and as such had, subject to any direction by the defendant McKenna, the general administration of the Act of 1947-1949; the defendant McKenna was the Minister of State for Health of the Commonwealth and as such had the overriding direction of Metcalfe in relation to the general administration of the Act. In the statement of claim uncompounded medicines, medicinal compounds, medical materials and medical appliances were referred to as "medicaments"; medicaments the names or formulae of which were contained or deemed to be included in the Commonwealth Pharmaceutical Formulary referred to in the Act and regulations and called the "formulary," or in the prescribed addendum thereto, were referred to as "formulary medicaments"; medicaments the names or formulae of which were not so contained or deemed were referred to as "extra-formulary medicaments". The statement of claim then proceeded substantially as follows:— "9. A large part of the professional work done by doctors consists of prescribing for the supply to their patients of such one or more, or such combinations of two or more, of the medicaments comprised in the following classes as in the opinion of doctors is or are in each case necessary or advisable for the proper medicinal treatment of the patient: (*a*) formulary medicaments; (*b*) medicaments, either formulary or extra-formulary, specified to be supplied in the form of a particular trade mark, brand, make or proprietary equivalent and in no other form; (*c*) extra-formulary medicaments consisting of medicinal compounds compounded according to formulae contained in the Formulary with variations other than those specified by the regulations as being permitted variations of those formulae; (*d*) other extra-formulary medicaments. 10. A large number of the medicaments prescribed by doctors for supply to patients are formulary medicaments. No doctor could carry on the practice of his profession with due regard to the proper medicinal treatment of his patients or at all if he were unable lawfully to prescribe all formulary medicaments and all medicaments comprised in any other of the abovementioned classes. 11. Substantially all chemists practising their profession throughout the Commonwealth applied to the defendant Director-General for approval in accordance with sub-s. (1) of s. 9 of the *Pharmaceutical Benefits Act* 1947 and were approved in accordance with that sub-section by or on behalf of the said defendant before 10th March 1949. There are few areas in the Commonwealth in which there is a chemist practising his profession in the area who has not applied for and obtained approval under that sub-section. 12. On the coming into operation of all

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

the provisions of the Act the plaintiff doctors will be substantially prevented from and hindered in practising and carrying on their professions and hindered in the proper treatment of their patients by, *inter alia*, the requirements of the Act and the regulations relating to the writing of prescriptions, the repeating of prescriptions, the quantities of formulary medicaments that may be prescribed, the prescription of formulary medicaments in the form of a particular trade mark, brand, make or proprietary equivalent, and the permitted variations of formulae contained in the Formulary." The plaintiffs submitted, in pars. 13 and 14, that the Act, or, alternatively, that ss. 7, 7A, 8, 11, 14, 21 and 23 of the Act was, or were, beyond the powers of the Commonwealth Parliament, contrary to the provisions of the Commonwealth Constitution and was, or were, void; and, in pars. 15 and 16, that the regulations, or, alternatively, that regs. 4, 11, 15-18, 23, 24, 29-31 and 34, were, or each was, not authorized by the Act and were, or was, beyond the powers of the Governor-General and void. "17. The defendants threaten and intend to prevent and hinder the plaintiff doctors from and in practising and carrying on their professions and to hinder them in the proper medicinal treatment of their patients by the enforcement, contrary to law and the provisions of the Constitution of the Commonwealth, of all the provisions of the Act and the regulations. 18. The plaintiff doctors desire to carry on and practise their professions and to prescribe the proper medicinal treatment of their patients without complying with the provisions of the Act or of the regulations, but the plaintiffs fear that they will be unable to do so by reason of the threats and intentions of the defendants as aforesaid, and the plaintiffs fear that by reason of the premises the plaintiff doctors will be substantially prevented from and hindered in practising and carrying on their professions and hindered in the proper medicinal treatment of their patients and that they and their servants and agents will be exposed to a multiplicity of prosecutions."

The plaintiffs claimed against all the defendants:—(i) a declaration that the *Pharmaceutical Benefits Act* 1947-1949, or, each of the said sections, was invalid and void; (ii) a declaration that the regulations were, or, alternatively, that each of the said regulations was invalid and void; and (iii) an injunction restraining them and each of them their servants and agents from preventing and hindering the plaintiff doctors from and in practising and carrying on their profession and from hindering those plaintiffs in the proper medicinal treatment of their patients by taking or causing or

permitting to be taken any action in pursuance or purported pursuance of any of the provisions of the Act or regulations.

The defendants demurred to the whole of the statement of claim on the grounds, *inter alia*, that :—(*a*) the *Pharmaceutical Benefits Act* 1947-1949 was a law validly made by the Commonwealth Parliament in pursuance of powers conferred upon it by the Commonwealth Constitution; and (*b*) the *Pharmaceutical Benefits Regulations* were and each of them was validly made by the Governor-General in pursuance of powers conferred upon him by the *Pharmaceutical Benefits Act* 1947-1949.

At the hearing of the demurrer leave to intervene was granted to the State of Victoria and the Attorney-General for Victoria.

The relevant provisions of the Act and of the regulations thereunder are sufficiently set forth in the judgments hereunder.

The Attorney-General of the Commonwealth (*H. V. Evatt* K.C.) (with him the Solicitor-General of the Commonwealth (*K. H. Bailey*), *Phillips* K.C. and *Menhennitt*), for the defendants in support of the demurrer. The plan of the *Pharmaceutical Benefits Act* 1947-1949 is that pharmaceutical benefits, as set out in s. 6, are to be made available to all members of the public resident in Australia with the exception, under s. 7 (1), that due to other arrangements having been made, patients occupying beds in a public ward in a public hospital are not entitled, as other residents are, to receive those benefits. The method adopted in the Act is practically the same as the method adopted in the *Pharmaceutical Benefits Act* 1944. Under the later scheme if the medical practitioner prescribes a benefit he is required, unless otherwise requested by the patient, to write his prescription on the form provided for that purpose by the Commonwealth. The Act is nothing but a provision in respect of the supply of pharmaceutical benefits free to members of the public so long as the conditions of the scheme are complied with. The purpose and plan of the Act is that the benefit is to be received by the patient only when a medical practitioner has prescribed such a benefit for him (*Attorney-General (Vict.)* v. *The Commonwealth* (1)). Sub-section (2) (*a*) of s. 7A of the Act is not necessary. All that s. 7A does is to forbid medical practitioners to write prescriptions for pharmaceutical benefits otherwise than on forms provided by the Commonwealth. It does not compel medical practitioners to write any prescriptions. Section 7A read in conjunction with s. 8 merely makes certain that in the case of the medical practitioner determining that the patient needs a

(1) (1945) 71 C.L.R. 237.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

prescribed benefit—one of the drugs on the formulary—he shall not refuse to take the step which will give the patient that very drug prescribed by him as being necessary to the patient's health. He is required to write that prescription on the form and it is on that form that payment is subsequently made by the Commonwealth to the chemist. Medical service is separate from pharmaceutical benefit for the purpose of furnishing prescriptions. The remarks made in *Attorney-General (Vict.)* v. *The Commonwealth* (1) apply with at least equal force to the Act of 1947-1949. Since par. (xxiiiA.) was inserted in s. 51 of the Constitution in 1946 it is no longer true to say, as in *Attorney-General (Vict.)* v. *The Commonwealth* (2) that laws may not be passed by the Commonwealth Parliament which have a direct and important bearing upon health. The situation evidenced in that case (3) has now completely altered; specific power to do the very kind of thing referred to has been given to the Commonwealth Parliament. The majority judgments in that case (4) were founded upon the absence from the Constitution of any provision which would justify the particular provisions of the Act of 1944; the Constitution has now been altered by the insertion of par. (xxiiiA.) and there is now a presence in the Constitution of the very thing the absence of which brought about the decision in that case. *Attorney-General (Vict.)* v. *The Commonwealth* (4) shows, both on the negative reasoning and the affirmative principle, that had there been a power in the Constitution which enabled the Commonwealth Parliament to pass laws for the provision to the public of pharmaceutical benefits all the things referred to would have been relevant to such a plan and such a scheme. The *Pharmaceutical Benefits Regulations* meet some objection to the rigidity of the formulary. Regulations 11, 15, 18, 27, 29 and 34 fall within the statute. They contain incidental provisions, convenient and necessary for carrying the Act into effect. Regulation 16 does not prevent any person buying as many medicaments as he chooses, but in order to obtain, say, an insulin syringe as a pharmaceutical benefit the conditions prescribed by the regulation in relation to the signing of a statement containing certain particulars must be satisfied. The word "supply" in reg. 17 means "supply under the Act." Regulation 23 simply applies to the medical practitioner the law which applies to chemists. Regulation 24 has been repealed. Regulation 31 is clearly relevant to the question of payment. The meaning of "pharmacy" and "pharmaceutical" is discussed in the *Encyclopedia Britannica*, 11th

(1) (1945) 71 C.L.R., at p. 267.
(2) (1945) 71 C.L.R., at pp. 251-257.
(3) (1945) 71 C.L.R., at pp. 258-260.
(4) (1945) 71 C.L.R. 237.

ed. (1910), vol. 21, p. 355, and *Webster's Dictionary*, 23rd ed., p. 1618. The word "pharmacy" includes the preparation of medicines by pharmacists in accordance with prescriptions of physicians, therefore it is clearly within a law passed by the Commonwealth Parliament for the supply of pharmaceutical benefits, not merely incidental to the legislative power of the Commonwealth but part of the power itself to provide that the benefits shall be obtained only if the medical practitioner so prescribes. Being able so to provide, Parliament clearly can prevent the statute from being defeated and the benefit from being enjoyed, by requiring the medical practitioner, without any interference at all with his practice, coming to his own conclusion that a formulary benefit should be prescribed and require him to put that prescription in writing. That is all that the Act requires to be done.

A. R. Taylor K.C. (with him *Webb* K.C., *T. W. Smith* K.C., *Ashburner* and *Riley*), for the plaintiffs. The extent of the law-making power can only be determined by reference to the language of par. (xxiiiA.). It is a matter of very great significance that part of the paragraph relates to the provision of benefits and other parts relate to the provision of services. The words to be found in association with the expression "pharmaceutical benefits" reflect on the meaning of "pharmaceutical benefits." Different language having been chosen, "benefit" must be something different from "service." There would be no power, on the language of par. (xxiiiA.), to authorize any form of civil conscription in which unemployment, hospital, sickness or pharmaceutical benefits were concerned. The paragraph itself is directed to the provision of benefits of the nature specified. Significance must be attached to the word "provision." On the form of the language the word "benefit" contemplates some special kind of grant, either in money or in goods, that is, a grant of some commodity. The giving of a commodity to some person in need involves the execution of some service in order to make the grant complete, but the only portion of par. (xxiiiA.) which contemplates a power to legislate with respect to services, and which would authorize the compulsory performance of services, is the reference to medical and dental services. The word "provision" in the paragraph means "provision by the Commonwealth." The only service contemplated is the service of the Commonwealth itself or of its officers. The prohibition in par. (xxiiiA.) of any form of civil conscription applies only to medical and dental services and that circumstance circumscribes the extent of the power with respect to every other prior expression

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

in the paragraph. The paragraph should not be construed in such a way as to authorize under the power to make laws with respect to the provision of pharmaceutical benefits some form of civil conscription of medical and dental services having regard to the express prohibition thereto. For a parallel view see *Bank of New South Wales* v. *The Commonwealth* (1). It is not necessary to have recourse to two separate paragraphs. A power to make laws with respect to medical and dental services appears in the same paragraph as a power to make laws with respect to pharmaceutical benefits, and it must be read as a power given to the Commonwealth to provide pharmaceutical benefits and not a power to provide services. The paragraph merely authorizes the Commonwealth to make laws with respect to the provision by it of the various benefits, pensions, allowances and services specified therein and it does not authorize the making of any law which amounts to any form of civil conscription, at least so far as the medical profession is concerned. A medical practitioner must render certain services, e.g. (i) he must determine whether his patient (*a*) is a person entitled to receive pharmaceutical benefits, and (*b*) falls within some other exception which has been prescribed; (ii) if the patient is so entitled the medical practitioner must write on a Commonwealth form unless he is requested not to do so. Failure to do so on the part of the medical practitioner is an offence under the Act and regulations. An obligation on medical practitioners is expressed also in ss. 8 and 11. The word " shall " in the regulation-making power contained in s. 23 (*a*) indicates that that power itself was quite enough to authorize direct legal compulsion on chemists, and, under s. 11, on medical practitioners, to supply pharmaceutical benefits. There was a very real obligation on chemists to supply and a very real sanction to compel them, because a refusal would immediately bring about ground for the revocation of the approval, with the consequent loss of their business. Pharmaceutical chemists who applied for and obtained approval became bound to supply pharmaceutical benefits without payment by the person presenting the prescription. They had undertaken to do so under the original Act. The necessary implication arising from s. 8 (3) is that the Act clearly contemplated that except in such circumstances as mentioned in that sub-section a chemist should be bound to dispense the medicines and to supply the goods to the persons who presented prescriptions. Although the revocation of an approved chemist's approval is not a legal sanction imposed by the Act, the possibility of such revocation is

(1) (1948) 76 C.L.R. 1, at pp. 201, 203.

just as effective and is a matter of practical compulsion. Section 23 (*a*) contains a power whereby the legal obligation could be imposed expressly upon chemists. The last amendment to s. 7A leaves completely untouched the obligation of medical practitioners to render service to patients who do not request that Commonwealth forms be not used. The obligation to give services on the part of medical practitioners still exists in just as vital a form as it did under the original s. 7A. Section 7A was introduced for the purpose of compelling medical practitioners to write prescriptions on Commonwealth forms unless they were otherwise requested, and the practical result is that unless the prescriptions are so written the medical practitioners would lose their practices. As shown by s. 16 the Act recognizes "services," and they are services which are availed of under practical compulsion because the medical practitioners are given the option of rendering the services or, in the language of the statement of claim, ceasing to carry on their practices at all. Medical practitioners are not given by the Act a right to obtain any Commonwealth forms. In the absence of such forms they cannot prescribe formulary medicines for persons who do not request that Commonwealth forms be not used. The fact that the regulations do, for the time being, make provision for the supply of forms does not make the Act valid on that point. Substantially the whole of the chemists in the Commonwealth became approved pharmaceutical chemists during March 1949, under the Act as originally enacted, and some months prior to the insertion in the Act of s. 7A in its present form, that is to say without knowledge of the present scheme which, introducing compulsion without option, is radically different from the then existing scheme. Approved chemists have no right to abandon that status; they cannot resign and are bound to remain until they are, *inter alia*, removed for "good cause." "Good cause" would be a refusal to supply. Upon such refusal removal could be directed by the Director-General. Removal would result in the loss of the business with respect to the dispensing and supply of medicines. The questions which arise upon a consideration of the provisions of the Act are: (i) whether the Act, and particularly s. 7A, is a law with respect to the provision of pharmaceutical benefits, or whether the Act or any part of it can be justified as incidental to a law with respect to the provision of pharmaceutical benefits; (ii) whether a number of sections of the Act, including s. 7A, constitute a law with respect to the provision of medical services; (iii) if so, whether s. 7A does not in some measure introduce a form of civil conscription; and (iv) whether ss. 7 and 8 constitute part of a law with respect to

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

the acquisition of property and, if so, whether just terms are provided. The expression "pharmaceutical benefits" as used in the Act is not synonymous with that expression as used in s. 51 (xxiiiA.) of the Constitution. The power given by the paragraph is a very special power. The benefits mentioned in par. (xxiiiA.) might take the form of the grant of money or of goods: see *Unemployment and Sickness Benefits Act* 1944. The Act is outside the area of pharmaceutical benefits. Not all the provisions of the Act fall within the category of the provision of pharmaceutical benefits. It is not a law with respect to the provision of pharmaceutical benefits, but a number of its provisions constitute laws with respect to medicines and drugs and for the control of them. "Pharmaceutical benefits" having been defined by the Act as medicines and drugs, every person is then declared to be entitled to receive whatever medicines and drugs may be specified in the formulary irrespective of State legislation as to the sale of poisons and drugs. The expression "pharmaceutical benefits" in par. (xxiiiA.) is merely a reference to a grant, either in money or in kind, which will enable persons to obtain drugs or medicines which otherwise may be lawfully obtained in the various States. The Act declares a right to receive, irrespective of State legislation—from chemists who are bound by State legislation—whatever may be contained in the Commonwealth formulary, therefore ss. 7 and 8, and other sections depending on ss. 7 and 8 for their validity, are outside the constitutional power. The extent of the constitutional power of the Commonwealth in relation to pharmaceutical benefits under par. (xxiiiA.) is limited by the laws in force, from time to time, in the several States. In any event s. 7A is not a law with respect to the provision of pharmaceutical benefits at all; it is a law with respect to the manner in which substantial services shall be performed by medical practitioners. It forbids the services of medical practitioners unless performed in a particular way. The direct effect of s. 7A is to regulate the manner of performance and to compel performance by medical practitioners of a substantial part of their practice. That is not authorized by the power to make laws with respect to the provision of pharmaceutical benefits, though it might be authorized by the power to provide medical and dental services were it not for the presence of the bracketed words in par. (xxiiiA.). The facts pleaded show that no medical practitioner could carry on the practice of his profession with due regard to the proper medicinal treatment of his patients unless he were in a position to prescribe the medicines included in the formulary. He has no real option in the matter at all, particularly having regard to the penalty

provided. The requirement is a practical compulsion of a very stringent nature. The application of the knowledge and skill of medical practitioners and the act of writing out a prescription are in themselves medical services: see s. 16. The words "any form of civil conscription" in par. (xxiiiA.) are important. The words "any form" are appropriate to refer to any form of compulsion, and this is a form of civil conscription *qua* those services. Those words mean any form of the compulsory rendering of service. There is a very real sanction. A description of the Act appears in *Attorney-General (Vict.)* v. *The Commonwealth* (1). There is no evidence that the prior scheme would not "work" and even if there were the "incidental power" provisions of s. 51 (xxxix.) of the Constitution are not applicable (*Crowe* v. *The Commonwealth* (2); *New South Wales* v. *The Commonwealth* [*No.* 1] (3); *Collins* v. *Hunter* (4)). Section 7A was not an essential part of the scheme in 1947; there had been a complete failure and the introduction of this feature made a completely radical alteration of the scheme. It could not be justified under the incidental power because it deals with medical services and there is a complete express power to deal with medical services. The provisions of par. (xxxi.) of s. 51 of the Constitution are not confined to laws for the acquisition of property by the Commonwealth (*Collins* v. *Hunter* (4); *McClintock* v. *The Commonwealth* (5)). Legislation which, as in this case, operates to produce a forced sale is within the paragraph. The terms are entirely within the discretion of the Commonwealth Executive. Whatever the prices may be which have in fact been fixed by the regulations, the whole scheme falls because it is within the power of the Commonwealth Government or a Commonwealth Minister to alter the regulations. There is no limitation on the power of the Minister to prescribe prices. He is not required to fix:—(i) fair and reasonable prices; (ii) just compensation, or (iii) market prices. Such a law is necessarily a law which does not provide just terms (*Australian Apple and Pear Marketing Board* v. *Tonking* (6)). The legislation itself must provide just terms. It follows that the whole scheme fails. Under s. 11 a medical practitioner may be "approved" whether or not he be willing to act. A chemist cannot, but a medical practitioner can, be compelled to act. "Adequate service," whatever may be

(1) (1945) 71 C.L.R., at pp. 258, 260, 262, 263.
(2) (1935) 54 C.L.R. 69, at p. 96.
(3) (1932) 46 C.L.R. 155, at pp. 212, 213.
(4) (1949) 79 C.L.R. 43.
(5) (1947) 75 C.L.R. 1, at pp. 23, 24, 35.
(6) (1942) 66 C.L.R. 77, at pp. 89, 99, 106, 107.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

comprehended, under s. 15, must be so wide as to extend beyond any of the matters referred to in par. (xxiiiA.). The provision in reg. 31 (2) which in effect authorizes a chemist to depart from the terms of medical practitioners' prescriptions is not within the head of power.

Sholl K.C. (with him *D. I. Menzies*), for the State of Victoria and the Attorney-General for Victoria, intervening by leave. In general the arguments addressed to the Court on behalf of the plaintiffs are adopted. Section 4 (2) of the *Pharmaceutical Benefits Act* 1947-1949, has not the effect of overcoming the criticisms which were passed upon the *Pharmaceutical Benefits Act* 1944. The Act of 1947-1949 is not a valid law with respect to the provision of pharmaceutical sickness or hospital benefits, or of such benefits and medical services within the meaning of par. (xxiiiA.) of s. 51 of the Constitution because: (*a*) it is not restricted to "pharmaceutical sickness and hospital benefits" within the meaning of the paragraph; (*b*) it does not deal with "provision" of pharmaceutical sickness or hospital benefits within the meaning of the paragraph; (*c*) if and insofar as it is a law with respect to the provision of medical services it authorizes "a form of civil conscription" within the meaning of the paragraph; and (*d*) it involves, wholly or alternatively in respect of portion of its operation, what is not the provision of "benefits" within the meaning of the paragraph. The last-mentioned ground relates to the operation of the Act in those cases where the alleged option of the patient is incapable of exercise. Nor is the Act supported by par. (xxxix.) as being legislation with respect to a matter or matters incidental to the execution of the power conferred by par. (xxiiiA.). Nor is s. 13 (2)-(2C) of the Act supported by s. 77 (iii.), or par. (xxiiiA.), or par. (xxxix.) of s. 51 of the Constitution or any other power. It is not a desirable thing from the point of view of the Supreme Courts of the States that they should have committed to them by any Commonwealth legislation a so-called appeal, involving "good cause," without the prescription of any certain legal guide or standard whatever to assist the courts in the exercise of the functions which purport to be committed to them. The Act is, in pith and substance, an Act to regulate, control, compel and prohibit medical, veterinary, and pharmaceutical practice; to regulate and control, in part, hospital administration, and to regulate, control, compel and prohibit supplies and standards of drugs and appliances. The Act covers in those terms prescriptions of drugs and medicines even

for veterinary services. The Act is not restricted to "pharmaceutical sickness or hospital" benefits within the meaning of par. (xxiiiA.). In that paragraph: (i) "pharmaceutical benefits" mean those "benefits" which comprise drugs or medicines for the medical treatment of humans, produced by means of the science or art of preparing drugs; "sickness benefits" mean those "benefits" which comprise things for the treatment of human sickness, or payments for the relief of poverty or distress caused by such sickness; and "hospital benefits" mean those "benefits" which comprise things or payments for the relief of human patients in hospitals; (ii) s. 6 extends the Act beyond any such limits. Section 6 (1) (*b*) extends "pharmaceutical benefits" to anything which the Executive likes to include in the regulations, so long as it is a "material" or an "appliance." The term is not limited to something a medical practitioner may ordinarily prescribe. It could be extended to cover cosmetics, babies' foods, toothpaste, and other toilet articles, bathing caps, or photographic goods. It need not, indeed, be limited to something a chemist ordinarily sells or may hereafter sell. It could be extended to cover any goods or appliances whatever; (iii) s. 6 (1) (*a*), (*b*) and (2) is not limited to matters relating to the treatment of humans, but could include veterinary medicines, medicinal compounds, materials and appliances. Section 7 (1) is not inconsistent with this, for it is a benefit for an owner to get drugs for his animals. Nor is s. 7A—it does not amend the original meaning of s. 6; and in any event s. 7A is limited to humans, the rest of the Act is not. It is of very great importance to a State and its inhabitants to find in a Federal Act under par. (xxiiiA.) the adoption of a definition which can have so wide an operation at the discretion of the Commonwealth Executive. In par. (xxiiiA.) the "pharmaceutical sickness and hospital benefits" and the "medical and dental service" respectively referred to are such as the State laws relating to drugs, poisons, patent medicines, medical and dental practice, &c., allow lawfully to be supplied. For example, the power to legislate to provide medical service would not authorize legislation for the carrying out of abortion contrary to State law; so the power to legislate to provide pharmaceutical benefits would not authorize the enactment of a law to provide medicine or drugs or appliances of a nature, or in quantities or combinations, prohibited by State laws. But the Act is not anywhere so limited as to be confined to the area of the power. Thus the Act may be made to apply by regulation to numbers of things ordinarily dealt with under State laws relating, *inter alia*, to medical practice, veterinary practice, pharmacy, health, drugs,

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

poisons, patent medicines, sale of goods, hospitals, mental hygiene and prices. It may be made to apply so as to operate contrary to such State laws, to cover medicines, drugs or appliances of a nature, or in quantities or combinations, prohibited by State laws. It may thus deal with matters not within par. (xxiiiA.). Section 7 purports to give the whole Act an operation quite independent of what is lawfully available under State law. Ground (iii) and the ground relating to State laws create non-severable invalidity, and ground (ii) may involve a severable invalidity. The power is a facultative power. It was not intended to enable the Commonwealth Parliament to interdict other sources of supply. The provision to enable the Commonwealth to supply things is not designed to forbid other people to supply things, nor is it designed to enable the Commonwealth to make available something which is contrary to State criminal law. The whole of the Act is based upon too wide a basis: the essential basis is that it is to be applied to whatever the Executive cares to put in the formulary, whether it be a pharmaceutical benefit, sickness or hospital benefit within the meaning of par. (xxiiiA.) or not, and unless the Act is brought down within the proper confines—which s. 15A of the *Acts Interpretation Act* 1901-1948 will not do—the whole Act must fall upon that basis. The Act does not deal with the "provision" of pharmaceutical, sickness, or hospital benefits within the meaning of the paragraph. On its proper construction, par. (xxiiiA.), in using the term "provision of" refers to provision by the Commonwealth. It is a facultative provision, which, combined with the incidental power and the appropriation power, enables the Commonwealth to: (i) provide, *inter alia*, pharmaceutical sickness or hospital benefits by its own servants; or (ii) make expenditure, with proper regulation and safeguards, on the enumerated subjects; (*a*) it does not authorize the compulsion of, or the prohibition of, or the regulation of, the provision of such matters by others, for example, the Commonwealth Parliament could not exclude a State from providing unemployment relief, hospital benefits, free dental services in State schools, free general X-ray tests for tuberculosis, iodine tablets for thyroid areas, pensions to widows under the State Superannuation Act, or otherwise, drugs for the inmates of mental or gaol hospitals, or assisted passages or bursaries to students. Equally, it could not compel the State to provide the same. And if so, it could not regulate the State's provision thereof. The bracketed words in par. (xxiiiA.) are sufficient to exclude from legislation passed under that paragraph the adoption of compulsory provisions if they fall within the expression "civil conscription."

The paragraph should not be interpreted in a manner which would authorize the Commonwealth at some future date to proceed to intervene in the regulation of any of the activities of the States in relation to these subject matters. Paragraph (xxiiiA.) does not authorize legislation which, by controlling or limiting or canalizing the activities of particular individuals or professions within the limits of a Commonwealth system, prevents the States from effectively acting with respect to the enumerated subject matters of the paragraph in a manner which involves the use of those individuals' or professions' services or activities, or the supply of their goods, outside the limits of the Commonwealth system. If s. 7A applies to the medical practitioner prescribing for a patient in a State hospital, he cannot, except on a Commonwealth form, write a prescription in the State hospital for a State hospital patient. Under neither par. (xxiii.) nor par. (xxiiiA.) could the Commonwealth Parliament prohibit a State from providing pensions, services, benefits, or allowances as there enumerated; or require that the provision thereof by a State or any of its officers shall be by or in accordance only with a Commonwealth system of forms, finance, or personnel. If this is true of a State, it is also true of its inhabitants. The compulsory provision of services by other than the Commonwealth's own servants is not within "the provision of pharmaceutical sickness and hospital benefits"; it must be found, if at all, under "the provision of medical and dental service," and any such power is subject to the limitation as to civil conscription. Otherwise as the subjects overlap, and "medical" cannot be limited to doctors, there might be claimed from the power regarding pharmaceutical sickness and hospital benefits, the power to legislate for a compulsory pharmaceutical or nursing or doctors' or dentists' service. Unless these submissions be correct it would be within Commonwealth power to pass legislation requiring the State of Victoria to provide pensions for widows in the State of New South Wales, or requiring testators, companies, churches, or any other class, to provide benefits to students, family allowances, or unemployment relief; and apart from the possible effect of par. (xxxi.), an Act compelling chemists to provide pharmaceutical benefits without any payment at all would be within power. The Act is not an Act with respect to the provision by the Commonwealth of pharmaceutical sickness or hospital benefits or medical services; or, alternatively, it goes far beyond any "provision" thereof within the meaning of par. (xxiiiA.). The power in par. (xxiiiA.) is not a power to make laws with respect to the provision by anybody of pharmaceutical benefits. As to pharmaceutical benefits, or

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

pharmaceutical, sickness and hospital benefits, it is now an Act purporting to compel individuals to "prescribe" (except on a condition independent of their will, s. 7A (2)), and to compel or at least allow other individuals to supply anything specified by regulation under s. 6. The element of compulsion is prescribed to medical practitioners except on conditions which are not of any relation to them, but relate to the option given to patients in certain circumstances. By virtue of s. 6 the extent of the compulsive provisions is carried over the whole area embraced by that section. It is not provision by the Commonwealth to enact legislation which purports to give power to regulate and control, for example, the method of prescribing and supplying drugs, appliances, &c., in State mental hospitals, State hospitals or sanatoria, State gaol hospitals, State police hospitals and State clinics; or the method of prescribing and supplying drugs, appliances, &c., by public service doctors, or by doctors of the Health Department treating wards of the State. The Act itself is wide enough to cover all those things. Section 23 (*d*) and reg. 2 (3) deal with the definition of public hospitals. The regulations cannot validate the Act; but in any event regs. 2 (3) and 33 do not exclude State institutions as referred to above. Notwithstanding regs. 2 (3) and 33, the Act purports to operate upon all medical practitioners prescribing in State institutions, and therefore it purports to impose obligations upon them of a compulsory character in relation to matters which are quite outside the provision by the Commonwealth of any of the matters enumerated in par. (xxiiiA.). Thus the whole Act goes beyond such "provision" of pharmaceutical, sickness and hospital benefits, and of medical services, as par. (xxiiiA.) contemplates. The paragraph must be limited, on a consideration of the history of the matter, the other terms of s. 51, and of the federal nature of the Constitution, to provision of a facultative character by the Commonwealth. If and insofar as the Act is an Act with respect to the provision of medical services, it authorizes a "form of civil conscription" within the meaning of par. (xxiiiA.). The limitation in brackets in par. (xxiiiA.) is not limited to medical and dental services, but if it is, insofar as under the power relating to pharmaceutical benefits it is sought to do anything which involves the provision of medical services or matters incidental thereto, the limitation applies. "Any form of civil conscription" is a very wide expression and includes any compulsion legal or practical by Commonwealth law to do in a civil capacity, any act in the course of medical practice for the purposes of the provision of medical services. The use of the word "civil" in par. (xxiiiA.) is a use tied up with the concept of

compelling service, compelling civil action or compelling action in the course of civil service, service as a civilian, and it is designed to exclude from the Commonwealth power any conception that compulsion can be brought to bear upon medical or dental practitioners and for the purpose and in the course of the carrying out of medical practice. The obligation imposed upon medical practitioners to use the Commonwealth form is a compulsory use of their professional services and is "civil conscription". The Act and regulations purport to impose a scheme which will—save in events not within the control of the State or a medical practitioner and which in some cases cannot occur, s. 7A (2)—prevent anything in the formulary or the addendum being prescribed except by compliance with a particular Commonwealth method or system, or save as performance may be dispensed with arbitrarily by Commonwealth regulations. This will apply to—(i) State-employed medical practitioners; (ii) State provision of medical services, for example, subsidized services in State institutions, schools, &c., for school children, wards of State, or members of the public being treated for State health purposes, &c.; and (iii) general medical practice. The conditions of s. 7A (2) are in all cases outside the control of the State or the medical practitioners. In some cases—unconscious, lunatic, some foreign or some gravely ill patients—no request by the patient or any other person may be possible at all within s. 7A (2), and the compulsion of s. 7A (1) is then quite unqualified, unless a doctor ceases to practise. The legislation thus purports to compel certain acts in the course of such medical practice for the purpose of the provision of medical services, and thus involves a form of civil conscription: ss. 7A, 11. The Act involves what is not the provision of "benefits" within the meaning of par. (xxiiiA.), either—(i) at all—if s. 8 means that one cannot get a pharmaceutical benefit at all from an approved chemist except under the Act; or (ii) in respect of portion of its operation at least, to the extent that no option can be exercised by an unconscious or a lunatic person or some gravely ill or some foreign persons. A "benefit" in par. (xxiiiA.) is something a person wants, not merely what someone may think he needs. If he is incapable of exercising any option of choice under s. 7A (2), then he has to get the "free-medicine" willy-nilly. In view of reg. 31 (2), it may even be an actual detriment. Thus in cases (ii) mentioned above the Act goes quite outside "benefits." As to (i) mentioned above, if s. 8 has the suggested meaning—as it appears to have—the position is that unless there can be found an unapproved chemist, or an approved chemist at unapproved premises, plus, in either case, a medical

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

practitioner prescribing on a Commonwealth form the person requiring the medicine can only get it under the Act. Such a law is in pith and substance not one with respect to the provision of pharmaceutical sickness or hospital "benefits," or of medical services without civil conscription; it is a law to prevent totally or partially the supply of pharmaceutical benefits for money. It is not a law to provide free medicine, but a law to prevent, to the extent that chemists become approved chemists, the supply of non-free medicine. It is no more valid under par. (xxiiiA.) than would be a law prohibiting the continuance of State or private insurance policies, pensions, or superannuation schemes in relation to widows, or prohibiting State unemployment relief. The Act is not supported by par. (xxxix.) in conjunction with par. (xxiiiA.) as being legislation "with respect to a matter or matters incidental" &c. So far as compulsion is concerned there cannot be got from the incidental power what is denied by the express terms of the paragraph. As to the meaning of the incidental power see *Le Mesurier* v. *Connor* (1). The extension of s. 6 beyond par. (xxiiiA.) cannot be thus justified; nor the prohibition in s. 7 (3), which goes beyond mere prevention of double payment, or the prevention of a charge to a person who wants free medicine; nor s. 7A (compulsion); nor s. 8 (unless in some way read down by reference to s. 4 (2)); nor s. 15 (unless limited to contractual arrangements not obnoxious to State laws); nor ss. 21 (*c*), (*e*), 23 (*a*), (*e*). Thus it would also not be possible to support, under the power, provisions to compel farmers to grow plants to provide drugs, importers to import drugs or appliances, individuals to serve in chemists' shops, drug houses, limb factories, &c. To require medical practitioners to use Commonwealth forms is not incidental to the provision of free medicine. It is a law with respect to the controlling of the activities of medical practitioners which may, or may not, result in the supply of free medicine. There are two arguments against the importation of compulsion into the execution of the power under par. (xxxix.), namely, the effect of the parenthesis in par. (xxiiiA.), and the reasonable limitation of the language of the various powers, so as to prevent them from justifying laws which are really laws with respect to a different substantive subject matter not committed to the Parliament. Section 21, particularly sub-ss. (*c*) and (*e*), and s. 23, particularly sub-ss. (*a*) and (*e*), go beyond any provisions justified by the incidental power. Section 13 (2)-(2C) are not supported by s. 77 (iii), or s. 51, par. (xxiiiA.) or par. (xxxix.), of the Constitution, or any other

(1) (1929) 42 C.L.R. 481, at pp. 497, 498.

power. The power of the Director-General under s. 13 (1) is clearly not Federal judicial power; and if it were, the provisions would be bad in the absence of compliance with s. 72 of the Constitution. The function purporting to be given to the Supreme Courts under s. 13 (2) and (2c) is not Federal judicial power. There is no precisely ascertainable standard of "good cause," which here implies discretion, personal assessment, opinion, perhaps expediency, and other administrative considerations. An appeal from such an administrative act is itself administrative, even if the function must be exercised "judicially" (*Moses* v. *Parker* (1); *Medical Board of Victoria* v. *Meyer* (2); *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (3); *Penton* v. *Australian Journalists' Association* (4)). There is no power of enforcement of the Supreme Court's decision: see s. 13 (2c) (*c*) (*Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (5)). That case goes the maximum distance in saying what is not Federal power. Non-judicial power cannot be conferred on a State Supreme Court, at all events when not conferred as incidental to the exercise of judicial power (*Le Mesurier* v. *Connor* (6); *Bond* v. *George A. Bond & Co. Ltd.* (7); *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (8)). The conferring on a court of a discretion as to whether or not it will exercise admittedly judicial powers, is distinguishable: *Barrett* v. *Opitz* (9), as also are tax-law cases, where a court exercises judicial power in determining whether an administrative officer or tribunal acted in accordance with the legal rights and duties of the parties (*Medical Board of Victoria* v. *Meyer* (10)). The Act is, in pith and substance, an Act—(i) to regulate, control, compel and prohibit medical, veterinary, and pharmaceutical practice; (ii) to regulate and control (in part) hospital administration; and (iii) to regulate, control, compel and prohibit supplies and standards of drugs and appliances (*Attorney-General (Vict.)* v. *The Commonwealth* (11); *Bank of New South Wales* v. *The Commonwealth* (12)). There is no obligation on the Commonwealth to supply prescribed forms to any medical practitioner, whether in the service of the State or in private practice. Regulation 11A, which may be repealed at any time, does not make the Act valid. By withholding or failing

(1) (1896) A.C. 245, at p. 248.
(2) (1937) 58 C.L.R. 62, at pp. 92, 104-106.
(3) (1925) 36 C.L.R. 442.
(4) (1947) 73 C.L.R. 549.
(5) (1944) 69 C.L.R. 185, at pp. 198-201, 213.
(6) (1929) 42 C.L.R. 481.
(7) (1930) 44 C.L.R. 11, at p. 22.
(8) (1943) 67 C.L.R. 25, at pp. 35-37, 46, 47.
(9) (1945) 70 C.L.R. 141, at p. 168.
(10) (1937) 58 C.L.R., at p. 92.
(11) (1945) 71 C.L.R., at pp. 250, 258, 260, 263.
(12) (1948) 76 C.L.R., at p. 182.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

to supply forms, the Commonwealth or the Director-General of Health can interfere with, regulate or terminate the practice of all or any medical practitioners (ss. 7, 7A, 8), or interfere with, regulate or nullify the activities of medical practitioners employed by or working under arrangement with a State: s. 7A. Section 7A applies to a prescription presented to an unapproved chemist, or to an approved chemist at unapproved premises. The Act is far beyond a law with respect to the provision of pharmaceutical benefits by the Commonwealth. It really enters directly into the conduct of medical practice in State institutions or in State activities. In the same way it can deal with the practice of any chemist through the medical practitioners: s. 8 (1) (*a*), (*b*). It is really an Act for the licensing of chemists: ss. 6, 9, 13. If s. 8 (1) (*b*) is given its ordinary meaning, then by the combined effect of ss. 6, 8 and 20 (1) (*d*) and the regulations, veterinary surgeons can be prevented from prescribing at all. A law which entitles the Commonwealth so to deal with the practice of individuals or the activities of State employees is not a law with respect to the provision of pharmaceutical sickness or hospital benefits or medical services, within the meaning of par. (xxiiiA.). Whether or not it comes under ss. 12-14 and 21, a hospital is partially controlled in its administration by ss. 6-9. Section 21 and s. 23 (*e*), enter into the sphere of supplies and standards of drugs and appliances. The whole substance of the Act goes, in the realm of regulation, prohibition and compulsion, far beyond what was contemplated by par. (xxiiiA.). On the question of severability see *R.* v. *Burgess*; *Ex parte Henry* (1) and *R.* v. *Poole*; *Ex parte Henry* [*No.* 2] (2). If the two principal portions of the Act are invalidated on any of the foregoing grounds then the whole scheme fails and there would not remain some severable system. If, for example, s. 6 extends the Act beyond the scope of par. (xxiiiA.) then there could not be severed out so much of the Act as would relate only to pharmaceutical benefits within the meaning of the paragraph. Similarly, if the provision as to the use of Commonwealth forms is invalid, then that is vital to the operation of the scheme contained in the legislation and there would have to be evolved some different scheme of legislation adopting some other method.

The Attorney-General, in reply. It is wrong to interpret the Act and par. (xxiiiA.) upon the assumption that existing State laws dealing in some respects with pharmaceutical benefits, with health, drugs

(1) (1936) 55 C.L.R. 608, at pp. 654, 674, 676.

(2) (1939) 61 C.L.R. 634, at p. 651.

and the like, have some constitutional protection. Regard should be had to the words of the paragraph (*Attorney-General (Vict.)* v. *The Commonwealth* (1)). The purpose is carried out by the Act which " provides a detailed and coherent plan " (*Attorney-General (Vict.)* v. *The Commonwealth* (2)). Its features are : the existence of a Commonwealth Formulary prescribing the substances which could be utilized in the scheme of benefits intended to be provided by the Commonwealth Parliament. The fact that those pharmaceutical substances will be made available to the people of Australia without charge subject to certain conditions, and that the chief condition is, for present purposes, that the benefit shall be prescribed by a medical practitioner, is part and parcel of the scheme and is not merely an ancillary provision thereto. The sole difference between the Act of 1944 and the Act of 1947-1949 is that when medical practitioners—coming independently to their decision as to what should be prescribed, not being told by the Commonwealth but reaching their own decision in the interests of the patients—prescribe something from the formulary, they must write that prescription on the Commonwealth form. That is far removed from " civil conscription " in the constitutional sense. " Civil conscription " is a phrase to be applied by analogy to military conscription in cases where the medical practitioner is no longer free to practise his profession. Under the Act medical practitioners are free to practise their profession. The Constitution was amended for the very purpose of providing or giving the legislature the power to enact a scheme of the type and character illustrated by the Act of 1944, and the Act of 1947-1949 is exactly of that type and character. The Commonwealth may provide benefits not only by its own servants but also by persons who are not servants of the Commonwealth. " Benefits " need not, and do not, merely consist of money payments. If for the peace order and good government of the Commonwealth as a whole a particular benefit should be provided by the Commonwealth, to the exclusion of additional, supplementary, or even competing State schemes, it would be competent for the Commonwealth Parliament, as part of the law, to validly exclude such schemes. There is no reason why that should not be included within the content of the power. But there is not in the Act any attempt to exclude any State schemes. It is a great new power of social services and it is entitled to, and doubtless will receive, a broad and liberal interpretation. In determining the meaning of the word " benefits " the Court will be guided by the view that has been expressed by the legislature and if, in the opinion

(1) (1945) 71 C.L.R., at p. 262. (2) (1945) 71 C.L.R., at p. 267.

H. C. OF A. 1949. BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

of the Court, that view is permissible or possible the Court will accept it. The provision of pharmaceutical benefits means, or at least includes, legislation which is directed towards securing and ensuring the supply of drugs, and not excluding, but including, appliances, subject to medical direction in the case of particular patients. "Benefit" could include a money payment made directly to the patient, and it certainly includes the provisions of a scheme aimed at providing or supplying to the patients of the actual pharmaceutical benefit, according to the direction of the medical practitioner. That interpretation removes any difficulties from s. 6. It is clear from s. 8 that it was intended that Commonwealth prescription forms should be supplied to medical practitioners. It is a proper assumption that the things are certain to be done in the ordinary course of administration which the section impliedly directs to be done. The absence of a statutory provision giving medical practitioners the right to obtain Commonwealth forms does not bear on the validity of the Act. The constitutional content in par. (xxiiiA.) is not limited to the making of laws to assist persons to obtain those things which may be legally obtained under the existing laws of a State. That is the established constitutional doctrine in this country. The Commonwealth Parliament has a discretion as to what things may be made the subject of pharmaceutical benefits, subject to the decision of the Court. It is not true that the power is facultative in the sense that legal sanctions, in other words laws, cannot be validly passed by the Commonwealth Parliament in relation to the subject matter of the paragraph. The Commonwealth, acting on the specific power in par. (xxiiiA.), can pass valid laws which in effect control in some degree, and displace in some degree, for the purposes of the Commonwealth power, State enactments. Medical practitioners are at liberty, so far as the Act is concerned, to prescribe what they think is necessary in the interests of the health of their patients. All that the Act does is to provide that if and when the medical practitioners determine that the formulary benefit should be prescribed in the interests of their patients, that they shall write that down on one document rather than on another document. It is clearly not a law with respect to medical services which interferes with medical practitioners in the course of their duty as such towards their patients. The requirement is simply a means of securing that the benefits should be obtained by the patients and that the administration of the Act would commence from that one point. The subject matter of s. 7A is merely the question of which form is to be used by medical practitioners for the purposes of writing out their prescriptions.

"Conscription" implies the placing of services in a general sense at the disposal of the community by a compulsory law enacted on behalf of the community. It refers to compulsory control in rendering the service to the community and to the patient, but it is not a law affecting some specific act which takes place in the course of medical practitioners freely carrying on their practices, e.g., death certificates. For many years the form of written prescriptions has been regulated by the laws of the States. The prohibitory words in par. (xxiiiA.) are not "but not so as to impose any compulsion." Writing a prescription on one document rather than on another document is not the performance of a medical service. The very fact that it is incidental to a scheme to provide pharmaceutical benefits tends to show that it does not impose any form of civil conscription. By writing their prescriptions on the Commonwealth form medical practitioners co-operate with the scheme and such co-operation is essential to the success of the scheme. The choice of the paper upon which a prescription is written is irrelevant to the performance of the medical service by medical practitioners. Whether it is regarded as a medical service or as a duty incidental to the carrying out of a pharmaceutical scheme, in either case it is quite different from what is contained in s. 16. That section contemplates that the patient is to be treated by a free service of medicine instituted by the Commonwealth: that is quite different from the operation of s. 7A. Even if s. 7A has an element of medical service, used in a general way, or some act done in the course of a practice, it is none the less a law with respect to the provision of pharmaceutical benefits, therefore par. (xxiiiA.) does not import any forbidding of civil conscription in relation to the "pharmaceutical benefits" power. The application of the words in brackets in that paragraph should be limited to medical and dental services. The word "services" attracts the forbidding of civil conscription. The change in the constitution took place at a time when the operation of the manpower regulations was coming to an end. The word "conscription" was used in the proposed law *Constitution Alteration* (*Industrial Employment*) 1946, and in the *National Security Act* 1939. The matter comes within the pharmaceutical benefits power and, therefore, no question of civil conscription arises. If, however, contrary to that, the Court thought it necessary to fall back on the medical services power it does not impose any form of civil conscription. "Pharmaceutical benefits" include drugs and appliances prescribed by medical practitioners for the treatment of diseases and ailments, and when so prescribed, are primarily to be regarded as covered and included

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

in the concept of the provision of "pharmaceutical benefits." Section 8 does not forbid the sale of medicines: it does not create offences, but merely lays down a further condition of eligibility for benefit. Regulation 31 deals only with the question of payment. Sections 7, 8 and 14 are not laws with respect to the acquisition of property. The Act is not concerned with any question of the acquisition of property. The real subject matter is the supply of drugs to patients at the expense of the Commonwealth, if prescribed by medical practitioners. There is no compulsion on chemists to supply property, to pass the title in the property, by reason of the presentation of prescriptions to them, nor is there any legal right in patients to enforce the handing over of the prescribed medicines. So that the acquisition, if it be regarded as acquisition, is a voluntary acquisition, and no question of just terms can arise. The power under s. 11 to approve a medical practitioner does not mean that he may be approved without his consent, and it could not be so interpreted. Under s. 13 (3) there is a duty to revoke his approval if requested by a chemist or a medical practitioner so to do. The whole of that provision emphasizes the voluntary nature of the scheme. An appeal from administrative functions in cases of this kind is common form and is a valid exercise of power by the Parliament (*British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1)). "Good cause" is a phrase which is frequently used in the exercise of judicial power: see *Burrows' Words and Phrases Judicially Defined*, vol. 2, pp. 411-414. Sections 21 and 23 are necessary for the proper and reasonable implementation of the scheme and are within power.

Cur. adv. vult.

Oct. 7.

The following written judgments were delivered:—

LATHAM C.J. Demurrer to a statement of claim in an action in which the plaintiffs are the Federal Council of the British Medical Association in Australia (which is incorporated under the laws of New South Wales) and six medical practitioners resident and practising in Victoria or New South Wales. Two of these practitioners hold official positions upon the Federal Council and two others of them are members of the Council. The defendants are the Commonwealth of Australia, the Commonwealth Director-General of Health, Dr. A. J. Metcalfe, and Nicholas Edward McKenna, Commonwealth Minister of Health.

The plaintiffs claim a declaration that the *Pharmaceutical Benefits Act* 1947-1949 is invalid as being beyond the powers of the Parlia-

(1) (1926) 38 C.L.R. 153, at pp. 175, 176, 178, 181.

ment of the Commonwealth and contrary to the Constitution of the Commonwealth. They also claim, alternatively, declarations that particular provisions contained in the Act and certain regulations made under the Act are invalid, and they seek appropriate injunctions. The defendants have demurred to the statement of claim, contending that the Act and the regulations are within the powers respectively of the Commonwealth Parliament and the Governor-General.

In 1944 the Commonwealth Parliament passed the *Pharmaceutical Benefits Act* 1944. In 1945 the validity of the Act was challenged in the case of *Attorney-General (Vict.)* v. *The Commonwealth* (1). The defendants in that action sought to support the validity of that Act solely by reason of the power of the Commonwealth Parliament to appropriate and provide for the expenditure of public money. It was held by the Court that the appropriation power did not extend so far as to provide constitutional foundation for the Act, and the Act was declared to be invalid.

In 1946 s. 51 of the Commonwealth Constitution was amended by including within the subjects with respect to which the Commonwealth Parliament should have power to make laws :—" (xxiiiA.) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances : ".

The defendants contend that the *Pharmaceutical Benefits Act* 1947-1949 is valid as being a law with respect to subjects specified in par. (xxiiiA.) and they support their argument by particular reference to " pharmaceutical benefits," but also to some extent by reference to " sickness and hospital benefits " and " medical services ". The defendants rely also upon s. 51 (xxxix.) of the Constitution, whereby power is conferred upon the Commonwealth Parliament to make laws with respect to—" Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

The plaintiffs, on the other hand, contend that the Act and the regulations made under the Act go beyond the powers conferred upon the Federal Parliament by the constitutional amendment. The Act (it is contended) relates to the provision of articles which do not fall within the category of pharmaceutical benefits or any

(1) (1945) 71 C.L.R. 237.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

other category mentioned in par. (xxiiiA). It is argued that the Act seeks to control various matters which are within the exclusive powers of the States—standards of drugs, sale of poisons, pure food provisions, hospitals &c. The plaintiffs also argue that there are provisions in the Act and the regulations which cannot be justified by calling in aid s. 51 (xxxix.) of the Constitution. It is submitted for the plaintiffs that the Act involves a form of civil conscription of medical practitioners, and that it is therefore invalid by reason of the prohibition contained in par. (xxiiiA.) of the authorization of "any form of civil conscription." It is further contended by the State of Victoria, which was granted leave to intervene, that s. 13 (2A), (2B) and (2C) of the Act, relating to the suspension or revocation of approval of pharmaceutical chemists, medical practitioners or hospital authorities under the Act, purports to confer non-judicial power upon State Courts, and therefore is beyond Federal legislative power.

I propose in the first place to summarize the statement of claim, then to state the substance of the Act and the regulations, and to deal with certain grounds upon which the validity of particular provisions is challenged. I will then examine the constitutional amendment upon which the defendant relies, and finally consider whether the legislation can be held to be valid under that amendment.

Statement of Claim. In an argument upon demurrer the allegations in the challenged pleading are, for the purposes of the demurrer, assumed to be true, and the question is, in the case of a demurrer to a statement of claim, whether, if all the allegations in the statement of claim are taken to be true, it discloses a cause of action so that the plaintiff will, if the allegations are established as true, be entitled to the relief claimed. The statement of claim alleges the passing of the Act and the making of the regulations under the Act, and states the interest of the plaintiff Council, which is a body corporate one of the objects of which is to advance the general interests of the medical profession in Australia. The interest of the individual plaintiffs has already been indicated. Uncompounded medicines, medicinal compounds, medical materials and medical appliances the names or formulae of which are included or deemed to be included in the Commonwealth Pharmaceutical Formulary prescribed under the Act are referred to in the statement of claim as "formulary medicaments." Other medicaments &c. are referred to as "extra-formulary medicaments." Paragraphs 9 and 10 of the statement of claim are as follows:—"9. A large part of the professional work done by doctors consists of prescribing for the

supply to their patients of such one or more, or such combinations of two or more, of the medicaments comprised in the following classes as in the opinion of doctors is or are in each case necessary or advisable for the proper medicinal treatment of the patient:—(*a*) formulary medicaments; (*b*) medicaments, either formulary or extra-formulary, specified to be supplied in the form of a particular trade mark, brand, make or proprietary equivalent and in no other form; (*c*) extra-formulary medicaments consisting of medicinal compounds compounded according to formulae contained in the Formulary with variations other than those specified by the Regulations as being permitted variations of those formulae; (*d*) other extra-formulary medicaments. 10. A large number of the medicaments prescribed by doctors for supply to patients are formulary medicaments. No doctor could carry on the practice of his profession with due regard to the proper medicinal treatment of his patients or at all if he were unable lawfully to prescribe all formulary medicaments and all medicaments comprised in any other of the abovementioned classes." In par. 11 it is alleged that substantially all chemists practising their profession throughout the Commonwealth have applied for and obtained approval under s. 9 (1) of the Act as pharmaceutical chemists. Paragraph 12 alleges that on the coming into operation of the provisions of the Act the plaintiff doctors will be substantially prevented from and hindered in practising and carrying on their professions and hindered in the proper medicinal treatment of their patients by the requirements of the Act relating to "the writing of prescriptions, the repeating of prescriptions, the quantities of formulary medicaments that may be prescribed, the prescription of formulary medicaments in the form of a particular trade mark, brand, make or proprietary equivalent, and the permitted variations of formulae contained in the Formulary."

The plaintiffs claim a declaration that the Act is invalid or, alternatively, that ss. 7, 7A, 8, 11, 14, 21 and 23 of the Act are invalid, and that the following regulations are invalid—regs. 4, 11, 15, 16, 17, 18, 23, 27, 29, 30, 31 and 34.

As already stated, the defendants have demurred to the whole of the statement of claim on the grounds that the Act and regulations are valid.

The Act. The Act is entitled the *Pharmaceutical Benefits Act* 1947-1949. Section 4 defines "medical practitioner" as a medical practitioner duly registered or licensed under Commonwealth or State law, and "pharmaceutical chemist" is defined in a corresponding manner.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

Section 4 (2) is of importance in the construction of the provisions of the Act. It is in the following terms:—"In this Act, any reference to the supply, obtaining or receipt of a pharmaceutical benefit shall, unless the contrary intention appears, be read as a reference to the supply, obtaining or receipt of that pharmaceutical benefit in accordance with this Act." Many provisions of the Act refer to the "supply, obtaining or receipt" of a pharmaceutical benefit. They do not apply merely to the procurement or delivery of a drug or medicine or appliance not as a benefit under the Act. All the provisions relating to supply, obtaining or receipt of a pharmaceutical benefit must be construed in the light of s. 4 (2). Thus, for example, s. 8 provides that a person shall not be entitled to receive a pharmaceutical benefit from an approved pharmaceutical chemist except upon certain conditions. This provision, referring as it does to the "receipt" of a pharmaceutical benefit, should be construed as applying to the receipt of a benefit in accordance with the Act. Thus s. 8 would not prevent any person from going to a chemist and buying a drug which, if supplied under and in accordance with the Act, would be a pharmaceutical benefit. When a customer simply made a purchase from a chemist he would not be receiving "a pharmaceutical benefit in accordance with this Act," although he might be receiving a drug which was included within the definition of "pharmaceutical benefits" contained in the Act. So also the chemist would not be supplying such a benefit.

Section 6 of the Act is as follows:—"(1) The pharmaceutical benefits referred to in this Act shall consist of—(*a*) uncompounded medicines the names of which, and medicinal compounds the formulae of which, are contained in a prescribed formulary to be known as the Commonwealth Pharmaceutical Formulary; and (*b*) materials and appliances (not being uncompounded medicines or medicinal compounds) the names of which are contained in a prescribed addendum to the Commonwealth Pharmaceutical Formulary. (2) The Commonwealth Pharmaceutical Formulary shall be deemed to include, as a formula, in addition to the formulae contained therein, each formula so contained with each variation specified by the regulations as being a permitted variation of that formula." Thus the pharmaceutical benefits for which the Act provides are (in class (*a*)) certain medicines and medicinal compounds, the formulae of which are contained in the prescribed formulary. The formulary contains a large number of prescriptions which are identified by a code consisting of letters and numbers. It is alleged in the statement of claim that a large part of a doctor's professional work consists in prescribing medicaments which are mentioned in

the formulary, and that a doctor would be unable to carry out his practice unless he were able lawfully to prescribe, *inter alia*, formulary medicaments. Class (*b*) of the pharmaceutical benefits referred to in s. 6 consists of materials and appliances (other than uncompounded medicines or medicinal compounds) the names of which are contained in the prescribed addendum to the Commonwealth Pharmaceutical Formulary.

Section 6 (2) provides that the formulary shall be deemed to include certain specified permitted variations of the formulae. These provisions are attacked on the ground that they are so wide that any material or appliance whatever could be added to the formulary and that any variation could be made in the formulae. It would be possible, according to this argument, to add beer and cosmetics to the formulary or any other goods whatever—articles which might have no relation to the treatment of human ailments and which therefore could not properly be called *pharmaceutical* benefits.

Section 6, however, must be read with the rest of the Act, and other provisions, especially s. 8 (1) (*b*), show that pharmaceutical benefits can be supplied and obtained in accordance with the Act only upon the prescription of a duly qualified medical practitioner. Accordingly, s. 6 does not have the effect of enabling the Governor-General to include in the formulary, or the addendum thereto, any article or thing whatever so as to entitle persons to receive it under the Act irrespective of the treatment of patients by means of drugs &c. The objection mentioned which has been taken to these provisions should therefore not succeed.

It is further contended, however, that materials and appliances which are not either uncompounded medicines or medicinal compounds (see s. 6 (1) (*b*)) cannot possibly be regarded as pharmaceutical articles. " Pharmaceutical " is defined in the *Oxford English Dictionary* as " Pertaining to or engaged in pharmacy; relating to the preparation, use, or sale of medicinal drugs," and " pharmacy " is defined in what is described as " the leading current sense " as " The art or practice of collecting, preparing, and dispensing drugs, esp. medicinally the compounding of medicines; the occupation of a druggist or pharmaceutical chemist."

It would be possible under s. 6 (1) (*b*) to prescribe in the addendum of the Commonwealth Pharmaceutical Formulary such articles as trusses and syringes. Indeed, eye droppers, insulin syringes, bandages and other materials or appliances are now included in the addendum to the formulary. In my opinion these articles cannot

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

be described as drugs or medicines and are accordingly not pharmaceutical in character. Legislation for the provision of them therefore cannot be supported under the power conferred by s. 51 (xxiiiA.) to make laws with respect to pharmaceutical benefits. But par. (xxiiiA.) also provides that laws may be made with respect to the provision of sickness and hospital benefits. In my opinion where the use of a syringe is necessary for the treatment of a disease, or some other appliance is required either to treat or to remedy some physical incapacity, the provision of such an article may properly be described as the provision of a "sickness benefit." I see no reason why these words should be limited to the payment of money during a period of sickness, which is the common form of friendly society sickness benefit. The provision of a necessary instrument or appliance for the treatment of sickness, treating the word "sickness" as including any form of ill-health or incapacity, is in my opinion the provision of a sickness benefit. Accordingly, I am of opinion that the arguments mentioned which have been adduced against the validity of s. 6 should not be accepted.

Section 7 (1) of the Act provides that, subject to the Act and except as prescribed, "every person (not being a patient occupying a bed in a public ward in a public hospital) ordinarily resident in the Commonwealth shall be entitled to receive pharmaceutical benefits." Section 7 (2) provides that, subject to sub-s. (4) (a special provision for special charges in prescribed cases) "a person receiving a pharmaceutical benefit shall not be under any obligation to make any payment therefor to the person supplying the pharmaceutical benefit." These provisions entitle any person ordinarily resident in the Commonwealth to obtain pharmaceutical benefits gratuitously. Section 14 provides that the Commonwealth shall pay the chemist or doctor for pharmaceutical benefits supplied.

It has been argued for the plaintiffs that s. 7 (2) is a provision affecting the general law in such a way as to produce the result that a person who receives from any other person any of the drugs or medicines &c. specified in the formulary or the addendum could not be required to pay for them, even though he had purported to buy them and had expressly or impliedly promised to pay for them. In my opinion s. 4 (2) provides an answer to this criticism. Section 7 (2) applies only to "a person receiving a pharmaceutical benefit," that is to say, (by reason of s. 4 (2)) receiving "a pharmaceutical benefit in accordance with this Act." If a resident of the Commonwealth went into a chemist's shop (whether the chemist was a chemist approved under the Act or not) and purchased a drug which was mentioned in the formulary, he would not be receiving a

pharmaceutical benefit in accordance with the Act, and s. 7 (2) would not operate so as to relieve him of the duty of paying for it.

Section 7 (2) is complemented by s. 7 (3), which provides that (subject to sub-s. (4)) an approved pharmaceutical chemist shall not demand or receive a payment (other than a payment from the Commonwealth) or other valuable consideration in respect of the supply of a pharmaceutical benefit. This provision was attacked by the arguments which have already been mentioned in connection with s. 7 (2). It was argued that s. 7 (3) amounted to a provision in the general law that chemists should not demand any payment for any of the drugs mentioned in the formulary. But s. 7 (3) only applies in respect to "the supply of a pharmaceutical benefit," that is (by reason of s. 4 (2)) the supply of a pharmaceutical benefit in accordance with the Act. An ordinary sale by a chemist to a customer is not a supply of a pharmaceutical benefit under the Act.

If s. 7 were construed in accordance with the plaintiffs' contention, I would be of opinion that it was invalid, because a power to make laws with respect to the provision by the Commonwealth (as I interpret s. 51 (xxiiiA.) for reasons to be stated) of drugs &c. would not authorize the Parliament to control the sale of drugs &c. or to prevent any member of the public from buying or selling drugs &c.

Section 7A (1) was inserted by the amending Act No. 8 of 1949. Act No. 26 of 1949 repealed s. 7A as it then stood and inserted the section as it now appears, that is, with the addition of sub-s. (2), which provides a means of escape from the otherwise absolute provision of sub-s. (1). Section 7A is as follows :—"(1) Subject to this section, a medical practitioner shall not write, in respect of a person entitled to receive pharmaceutical benefits, a prescription for—(*a*) an uncompounded medicine the name of which, or a medicinal compound the formula of which, is contained, or is deemed to be included, in the Commonwealth Pharmaceutical Formulary ; or (*b*) a material or appliance the name of which is contained in the prescribed addendum to the Commonwealth Pharmaceutical Formulary, otherwise than on a prescription form supplied by the Commonwealth for the purposes of this Act. Penalty : Fifty pounds. (2) The last preceding sub-section shall not apply—(*a*) in any case in which the person in respect of whom, or at whose request, the prescription is written requests the medical practitioner not to write the prescription on a prescription form supplied by the Commonwealth for the purposes of this Act ; or (*b*) in such other cases or circumstances as are prescribed."

Section 7A (1) imposes a penalty on any medical practitioner who writes a prescription for a medicine the formula of which is contained

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

in the formulary, or for any material or appliance &c. the name of which is contained in the addendum otherwise than on a prescription form supplied by the Commonwealth. The statement of claim alleges that a very large number of ordinary prescriptions are contained in the formulary. It would therefore be an offence for a doctor to write otherwise than on a Commonwealth form a large number of prescriptions which he would require for his patients in the course of treatment if he carried on practice.

Section 7A (2) provides an exception to the obligation imposed upon the doctor by s. 7A (1). The doctor is not bound to write the prescription on the Commonwealth form if the person in respect of whom or at whose request the prescription is written requests the medical practitioner not to write the prescription on the Commonwealth form. The effect of this provision is that a patient or certain other persons may relieve the doctor from the duty of writing the prescription on the Commonwealth form. The result will then be that the patient or other person will pay the chemist in the ordinary way for making up the prescription and will not get his medicine free. It will depend entirely upon the patient or other person whether he requests the doctor not to use the Commonwealth form. Therefore the position created by the statute is that the doctor is bound to write upon a Commonwealth form a large number, possibly nearly all, of the prescriptions which he uses, except where a condition is satisfied which it is not within the power of the doctor to control or to fulfil, namely a request by the patient or the other person that the doctor shall not write the prescription upon the Commonwealth form. Thus the legislation has the effect of compelling doctors to write practically all their prescriptions upon Commonwealth official forms and not otherwise, although, as s. 7A (2) (*b*) provides, other exceptions may be prescribed.

It was pointed out in argument for the plaintiffs and the intervening State that some persons in respect of whom a prescription was written might be incapable of requesting the medical practitioner not to write the prescription on a Commonwealth form by reason of infancy or extreme old age, lunacy or sickness, or diminished or destroyed control of faculties. It is true that sub-s. (2) of s. 7A would not become applicable in some such cases. The only result, however, would be that the doctor would write the prescription on a Commonwealth form and that the pharmaceutical benefit could be obtained for the patient gratuitously upon presentation to an approved chemist. This fact does not lead to any conclusion adverse to the validity of the Act. It shows only that what might be called the power of a patient to excuse a doctor from

writing a prescription on a Commonwealth form does not exist in some cases. In other words, the exceptions from the application of s. 7A (1) are not as wide as might at first be thought to be the case. But this fact simply leaves for consideration the validity of s. 7A (1) in its application to the cases—probably the vast majority of cases—in which, according to its terms, it would be applicable.

A further criticism of s. 7A (2) was that where a patient was incapable of making a request it could not be said that the patient wanted the benefit, but only that in the opinion of the doctor he needed it. It was suggested that in such a case the provision of the alleged benefit would not be a real benefit, and that therefore the provision for the supply of such an alleged but not real benefit was outside the power to make laws with respect to the provision of pharmaceutical or other benefits. An answer to this contention is to be found in the fact that no pharmaceutical benefit can be provided under the Act except in accordance with the prescription of a legally qualified medical practitioner. It is in my opinion quite reasonable for Parliament to accept the opinion of the doctor treating a patient with respect to the drugs and medicines &c. which will be beneficial in the treatment of that patient. It is difficult indeed to think of any provision which would be likely to be more effectual in providing that the free distribution of medicine should do good and not harm.

It will be necessary to consider the effect of s. 7A with particular reference to the provision contained in s. 51 (xxiiiA.) of the Constitution with respect to civil conscription. It is contended for the plaintiffs that s. 7A compels doctors to practise their profession in a particular way, and therefore amounts to a form of civil conscription. These arguments will be considered in due course.

Section 8 (1) provides that a person shall not be entitled to receive a pharmaceutical benefit from an approved pharmaceutical chemist except—" (*a*) at or from premises in respect of which that pharmaceutical chemist is for the time being approved; and (*b*) on presentation of a prescription written and signed by a medical practitioner and, except as prescribed, written on a prescription form supplied by the Commonwealth for the purposes of this Act." I have already stated my opinion as to the meaning of these provisions when read with s. 4 (2).

Section 8 (2) contains a provision requiring repeat prescriptions to be authorized in the handwriting of the medical practitioner on the prescription form. Section 8 (3) provides that where a pharmaceutical chemist suspects that a prescription written on a Commonwealth form has not been signed by a medical practitioner or has

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

been forged or fraudulently obtained, he shall be entitled, before supplying the pharmaceutical benefit specified in the prescription, to require that there be furnished to him a statement in accordance with the prescribed form.

These provisions define the conditions upon which free medicines are to be supplied and obtained. If they are not complied with, the medicine is not supplied free. But no person is compelled to comply with the conditions—except in order to get the medicine &c. free if he so desires. I can see no reason why the Commonwealth Parliament should not make its gifts dependent upon such conditions.

Section 9 provides for the approval by the Director-General of pharmaceutical chemists for the purpose of supplying pharmaceutical benefits at or from particular premises. Section 9 (5) requires an approved pharmaceutical chemist to display approved signs.

Section 10 relates to friendly society dispensaries and enables them to be used as a means for supplying pharmaceutical benefits under the Act.

Section 11 is in the following terms:—"(1) Where there is no approved pharmaceutical chemist in a particular area, the Director-General may approve a medical practitioner practising in that area for the purpose of supplying pharmaceutical benefits. (2) Pharmaceutical benefits supplied by a medical practitioner so approved shall be supplied in accordance with such conditions as are prescribed."

It was contended by the plaintiffs that this section entitled the Director-General to approve a medical practitioner for the purpose of supplying pharmaceutical benefits without the consent of that practitioner, so that the result would be that the medical practitioner would be compelled to supply pharmaceutical benefits against his will. This, it was contended, was a form of civil conscription in relation to medical services which was excluded from Commonwealth constitutional power by s. 51 (xxiiiA.) of the Constitution. In my opinion the initial proposition upon which the argument depends should not be accepted. The provision that an official may approve a particular person for a particular purpose, in my opinion, assumes that that person is prepared to act for that purpose. A power to approve persons as mining engineers, or as tram conductors, could not be construed as a power to compel persons to act as mining engineers or as tram conductors.

Section 12 contains provisions with respect to hospitals. It was contended that these and other provisions interfered with the management by the State of hospitals established by the State or

constituted under State law. This argument was associated with a more general argument to the effect that the Act in imposing obligations upon doctors and chemists in relation to the prescribing and sale of drugs and medicines interfered with the operation of many State laws relating to those subjects in connection with medical practice, veterinary practice, pharmacy, health, drugs, poisons, patent medicines, sale of goods, hospitals, mental hygiene, prices &c. Doubtless the Commonwealth scheme would interfere with the application of many of these laws, but if the Commonwealth Act is an Act which falls within the terms of s. 51 (xxiiiA.) of the Constitution, any State law which is inconsistent with it is subordinate to it, and the Commonwealth law prevails: Constitution, s. 109. It is quite immaterial that the State law may also be described as a law with respect to medical practice or health or drugs or poisons or hospitals &c. If the Federal legislation is authorized by the Federal Constitution, then it prevails over any inconsistent State law. The question to be determined is whether the statute is within Federal power. It is a wrong approach to this question to inquire whether the Federal statute, if upheld, would prevent or interfere with the operation of State statutes.

Section 13 (1) provides that the Director-General may, for good cause shown in accordance with the regulations, suspend or revoke his approval of a pharmaceutical chemist, medical practitioner or hospital authority under the Act, and may at any time remove such suspension or restore any such approval. Section 13 (2) provides that where there has been a suspension or revocation of approval the person or hospital affected may appeal to the Supreme Court of a State or Territory of the Commonwealth. Section 13 (2A) purports to invest the Supreme Court of each State with Federal jurisdiction to hear and determine appeals. The Director-General is to be the respondent in any such appeal—s. 13 (2B). Section 13 (2C) provides for the powers of the Supreme Court upon the hearing of an appeal. Orders made under these powers would be orders of the Supreme Court and would be enforceable as such.

It is contended that these provisions purport to confer upon a State Supreme Court power which is not judicial in character because the provision that the Director-General may "for good cause shown" suspend or revoke approval is so vague that there can be no criterion which a Supreme Court could apply in determining whether or not to allow an appeal. It is therefore said that this section purports to confer upon a Supreme Court what is really an administrative and not a judicial power, and that therefore the Commonwealth Parliament has no power to invest a State

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

court with this power. The Constitution, s. 77 (iii.), authorizes the Parliament to make laws investing any court of a State with Federal jurisdiction. The jurisdiction which can be vested in a court under this provision is plainly jurisdiction of a judicial character. That which can be vested in a State court is "judicial power of the Commonwealth": see Constitution, s. 71, which provides that "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court . . . and . . . other Federal courts . . . and in such other courts as it invests with federal jurisdiction." It is only by virtue of this provision and s. 77 (iii.) that the Commonwealth Parliament can invest a State court with jurisdiction so that the court becomes bound to exercise it. There is no provision in the Constitution which enables the Commonwealth Parliament to require State courts to exercise any form of non-judicial power.

It is settled that in what is called an "appeal" to a court from an administrative officer or body the court exercises judicial power in an original, not in an appellate, jurisdiction. Well-known instances are to be found in Federal law in appeals to a court from the Commissioner of Patents, the Registrar of Trade Marks, the Commissioner of Taxation and the Board of Review under various taxation Acts: see *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (1).

The objection based on the alleged vagueness of the words "good cause" cannot be sustained. A successful litigant can be deprived of costs for good cause. A person may be bound over to be of good behaviour. A tenant may be bound to keep premises in good tenantable repair. In each case the court interprets the word "good" in relation to the relevant circumstances—the conduct of the litigant, the behaviour of the person bound over, the condition and habitability of the premises. In the same way, upon an appeal under s. 13 (2A) the court would consider the conduct and qualifications of the appellant in relation to the purposes of the Act. The function of the court would be similar to that of the Supreme Court of Victoria in an appeal by a medical practitioner from a refusal of registration by the Medical Board. In *Medical Board of Victoria* v. *Meyer* (2) it was held that the Supreme Court was acting in a judicial capacity in hearing and determining such an appeal. Thus the objections to s. 13 (2), (2A), (2B) and (2C) fail.

If these provisions were held to be invalid the only result would be that there would be no appeal from a decision of the Director-

(1) (1931) A.C. 275, at pp. 295, 297, 298; 44 C.L.R. 530, at pp. 542, 544, 545.

(2) (1937) 58 C.L.R. 62.

General suspending or revoking approval of a chemist, doctor or hospital authority—the whole matter would be left to his uncontrolled discretion. Further, these provisions—which were inserted in the statute by an amending Act—No. 8 of 1949—are clearly severable from the rest of the Act, and, if they were held to be invalid, the validity of other provisions would not be affected.

Section 14 provides for the payment of chemists by the Commonwealth for pharmaceutical benefits supplied under the Act. The payment is to be made out of public moneys, and presumably there will be some official check upon payments. Any checking of payments would involve the examination of a large number of prescriptions, even if it were thought not to be necessary to examine all prescriptions. If each person ordinarily resident in the Commonwealth obtained only one prescription a year there would be more than seven million prescriptions upon which the Commonwealth would make payments—and the prospect of obtaining medicine for nothing would not tend to diminish the number of prescriptions. Thus the provision in s. 14 that pharmaceutical chemists shall be entitled to payment by the Commonwealth in respect of pharmaceutical benefits involves almost necessarily a system of supplying pharmaceutical benefits which it will be possible to check. Further reference will be made to this matter at a later stage.

Section 15 contained a special provision for isolated areas, and s. 16 is as follows :—" The Minister may, on behalf of the Commonwealth, enter into an agreement (on such terms as to remuneration, allowances and otherwise as he thinks fit) with a medical practitioner providing that the services of the medical practitioner shall be available without charge to members of the public for the purpose of furnishing prescriptions for the purposes of this Act." Where an agreement is made in pursuance of this section the Commonwealth would pay the doctor for examining the patient and prescribing, that is to say, s. 16 relates to the provision of medical services, which is a matter to which s. 51 (xxiiiA.) of the Constitution expressly refers. As the services would be rendered in pursuance of an agreement between the practitioner and the Commonwealth, there could be no objection to this provision upon the ground that it involved some form of civil conscription.

Section 20 provides for penalties for making false statements &c. Section 20 (1) (*c*) was attacked. It provides that a person shall not " obtain a payment in respect of the supply of a pharmaceutical benefit which is not payable." It was suggested that this imposed a penalty upon a chemist who sold to any person a drug or medicine included in the formulary and obtained payment therefor. I have

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

already given reasons for my opinion that this is not the case. The challenged provision relates to "the supply of a pharmaceutical benefit." The ordinary purchase and sale of a drug is not the supply of a pharmaceutical benefit in accordance with the Act. Accordingly, s. 4 (2) provides the answer to the stated objection.

Section 21 confers powers upon certain authorized persons to enter the premises of approved pharmaceutical chemists or hospital authorities to make an examination or inquiry for the purpose of ascertaining whether the provisions of the Act are being complied with, to take samples of drugs &c. which may be supplied as, or may be ingredients of, pharmaceutical benefits, and to examine persons employed in the premises of such chemists or authorities with respect to any matter under the Act and, further, to exercise such powers and functions as are prescribed. It was contended that other provisions of the Act are invalid, and that therefore the provisions of s. 21 exceed the limits of lawful legislative authority. Section 21 relates to chemists and hospitals and not to doctors. For reasons which I state hereafter I can see no reason why any of the provisions of the Act which relate only to chemists and hospitals are invalid, and even if a provision or some of the provisions with respect to doctors are invalid, that fact would not affect the meaning, though it would limit the operation, of s. 21. Accordingly, in my opinion s. 21 should not be held to be invalid upon the grounds suggested.

Section 23 contains the regulation-making power in the ordinary form—a power to prescribe all matters which are by the Act required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act—and in particular "(*a*) for prescribing the terms and conditions subject to which pharmaceutical benefits shall be supplied" and certain other matters. If substantial provisions of the Act are invalid, then the power to make regulations cannot be completely valid—it would not vanish, but would be limited by relation to such parts of the Act as survived.

The Regulations. Regulations have been made under the Act —Statutory Rules 1948 No. 56; 1948 No. 155; 1949 No. 44. Regulation 4 prescribes the formulary (see s. 6 (1) (*a*)) in the Second Schedule, the addendum to the formulary (see s. 6 (1) (*b*)) in the Third Schedule and the permitted variations of the formulae (see s. 6 (2)).

Regulation 11 provides that where a medical practitioner writes a prescription on a prescription form he shall indicate the pharmaceutical benefit to be supplied by using the title thereof as specified in the formulary or addendum, or where he includes a permitted

variation, by using the title specified in the formulary of the formula and setting out the variation. Other provisions of reg. 11 are as follows :—" (2) A medical practitioner who writes a prescription on a prescription form shall—(*a*) write the prescription in duplicate ; (*b*) not write more than one other prescription on the prescription form ; (*c*) indicate on the prescription form the date on which he writes the prescription ; and (*d*) draw a line through the unused portion of the prescription form. (3) A medical practitioner shall not use a prescription form otherwise than for the writing of a prescription in accordance with, and for the purposes of, the Act and these Regulations. (4) Where a medical practitioner considers it necessary to write a prescription but a prescription form is not immediately available for that purpose, he may write the prescription on any suitable paper if—(*a*) he indicates on the paper that a prescription form is not available ; and (*b*) he writes the words 'Pharmaceutical Benefits Act' at the top of the prescription." Sub-regulation (5) makes further provisions in relation to the cases mentioned in sub-reg. (4).

Regulation 11A provides that " The Director-General shall cause supplies of prescription forms to be available at the offices of the Department of Health in each State or Territory of the Commonwealth and to be furnished to medical practitioners on request made personally or by post." It is submitted for the plaintiffs that if s. 7A, requiring the use of Commonwealth forms, is valid, a doctor could not carry on his practice unless he obtained the forms and used them in the manner prescribed by reg. 11, and that the statute did not give the doctor any right to obtain the forms. Regulation 11A imposes on the Director-General a duty to furnish forms, but I agree that it is at least open to argument whether it confers upon each individual medical practitioner a right to be supplied with such number of forms as he may ask for from time to time. But in my opinion these criticisms relate only to the policy and the fairness of the Act and have no relation to the question of its validity. It may be argued that it is unjust to place doctors in the position of in effect having to beg for forms so that they are unable to practise if a clerk in the Commonwealth Health Department fails to send forms to them for any reason. This criticism, however, is a criticism of the policy of the Act (with which the Court is not concerned—that is a matter for Parliament and the constituencies), and in my opinion has nothing to do with the validity of the Act.

Regulation 15 contains special provisions relating to repeat prescriptions for pharmaceutical benefits. It was contended that this was really legislation with respect to the manner of carrying

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

on medical practice and that such an enactment was beyond the power of the Commonwealth Parliament. In my opinion this objection is met by the provision of s. 4 (2) of the Act. Regulation 15 is limited to the supply of pharmaceutical benefits, and therefore to the supply of them in accordance with the Act. The Commonwealth Parliament, in providing for gratuitous pharmaceutical benefits may, in my opinion, provide for the conditions which are to be satisfied before such benefits are to be supplied.

Some criticism was directed against reg. 16, which provides that a person shall not be entitled to obtain an insulin syringe as a pharmaceutical benefit unless he states in writing, *inter alia*, that he does not possess a hypodermic syringe and has not been supplied within six months with a hypodermic syringe. It is pointed out that this provision might leave patients without a syringe for a substantial period. Such a criticism has nothing to do with the validity of the regulation.

A declaration is sought that reg. 17 is invalid. This regulation provides that pharmaceutical benefits shall not be supplied on presentation of prescriptions more than six months old. It appears to me that this is a perfectly natural provision which may validly be included in any scheme for supplying free medicine. The Commonwealth Parliament is under no obligation to pass a law for providing pharmaceutical benefits. If it does make such a law, it can make the provision as wide or as narrow as it thinks proper.

Regulation 18 provides that, save in urgent cases, a person shall not be entitled to receive a pharmaceutical benefit from an approved pharmaceutical chemist except during the usual trading hours of the chemist. I can see no reason why it should be said that such a provision is invalid. It is intended to prevent the lives of chemists being made a burden by being called upon to supply medicines during non-trading hours by persons who might contend that they had an absolute right to get them in accordance with Commonwealth statute, and that the chemist had to supply them at any hour at which they might choose to apply. If the Commonwealth Parliament thought fit it could limit the supply of free medicines to persons who applied at a particular specified hour at a particular specified place. In my opinion reg. 18 is a provision which is plainly incidental to the working of a sensible scheme of gratuitous provision of medicines &c.

Regulation 23 deals with medical practitioners who have been approved under s. 11 of the Act and applies to them the provisions which are applicable in the case of an approved pharmaceutical chemist. I have already referred to and dealt with the contention

that s. 11 is invalid, and, if s. 11 is valid, there can be no objection to reg. 23.

Regulation 27 provides that where samples are taken under s. 21 the Commonwealth shall make payment therefor either at rates specified in the Fifth Schedule or, in the case of ingredients of a benefit, at prevailing retail prices. It is contended that these provisions do not secure just terms for the acquisition of property, and that therefore they are invalid: see the Constitution, s. 51 (xxxi.). In my opinion this argument should be rejected. There is no allegation in the statement of claim which shows that the rates specified in the Fifth Schedule do not provide ample payment for the articles to which they refer; a prevailing retail price is obviously a fair price and therefore amounts to just terms in the other cases to which the regulation applies.

Regulation 29 imposes a penalty upon persons who obstruct any authorized person in the execution of his powers under s. 21 of the Act. The validity of this regulation depends upon the validity of s. 21, which, as already stated, depends upon the validity of the other provisions of the Act.

Regulation 31 provides for rates of payment by the Commonwealth to pharmaceutical chemists and medical practitioners in respect of the supply of pharmaceutical benefits under the Act. Regulation 31 (2) provides that a chemist shall not be bound to supply a pharmaceutical benefit in the form of a particular trade mark, brand, make, or proprietary equivalent, and that if he does supply the benefit in that form, the rate of payment shall nevertheless be the rate for that pharmaceutical benefit ascertained in accordance with the regulations unless the Director-General in special circumstances directs that payment shall be made at a higher rate. This provision is objected to because, in certain cases, as is alleged in the statement of claim, it is a particular brand or preparation of a drug which is in the opinion of a medical practitioner necessary for the treatment of the patient, and it is argued that in some way this regulation prevents the supply of that particular brand or preparation. I do not so understand the regulation. It means only that in certain cases a person shall not be entitled under the Act to receive " a pharmaceutical benefit " in a particular form. Such a negative provision cannot be invalid. It does not infringe any constitutional provision. It merely limits the benefits which can be obtained under the Act. The Parliament can limit those benefits by excluding, at will, any particular drugs or medicines from supply under the Act. If the benefit is supplied in a particular form the rate of payment is to be that set out in the regulations.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

This is a reasonable form of protection of the Commonwealth against extravagant over-charge for proprietary medicines. But there is no provision in the Act which prevents a patient from buying a drug or medicine at any price which he chooses to pay.

With respect to reg. 31, an argument for the plaintiffs similar to that put forward in relation to s. 7A (2) was submitted to the effect that the supply of a pharmaceutical benefit not of the particular trade mark, brand, make &c. ordered by the doctor might be the reverse of beneficial to a patient. But reg. 31 (2) does not provide for the substitution of any medicine for that ordered by the doctor. It provides only that if a medicine in the form of a particular trade mark &c. is ordered the chemist shall not be bound to supply it, and if he does supply it he shall supply it at a prescribed price. In other words, this provision reduces the scope of the benefits available under the Act by providing that in certain cases prescribed medicines shall not be supplied except for a payment by the Commonwealth at a particular price. This provision, limiting the benefits obtainable under the Act, cannot be invalid itself and cannot render invalid any of the positive provisions in the Act which prescribe the benefits which may lawfully be provided und er the Act.

A claim is made that reg. 34 is invalid. This regulation authorizes the Director-General to require a person other than a medical practitioner to deliver up any unused forms in his possession supplied to him by the Commonwealth for the purpose of the Act or the regulations. No argument was specifically directed against the particular regulation in itself, but it was assumed that it would be invalid if other provisions relating to the compulsory use of the forms were invalid.

The Constitution, s. 51 (xxiiiA.). Under s. 51 (xxiiiA.) of the Constitution the Commonwealth Parliament is authorized to make laws with respect to—"The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances."

Upon this provision the following observations may be made:—(1) The power is not a power to make laws with respect to, e.g. pharmaceutical benefits and medical services. It is a power to make laws with respect to *the provision of* such benefits and services. A power to make laws with respect to medical services might well be held to be a power which would authorize a law providing for the complete control of medical services rendered by any person to

any other person and so would enable the legislature to control the practice of the medical profession completely or to such less extent as Parliament might think proper. Similarly, if the power were a power to make a law with respect to pharmaceutical benefits it could be argued (with some doubt because of the eleemosynary suggestion contained in the word "benefits") that such a power would authorize a law for the complete control of the business of pharmaceutical chemists. But the actual power is a power to make laws, not with respect to pharmaceutical benefits or with respect to medical services &c., but with respect to the *provision* of such benefits and services. It is accordingly argued that a distinction should be drawn between powers in the two forms, namely, (1) a power to make laws with respect to, e.g. pharmaceutical benefits, and (2) a power to make laws with respect to *the provision of* pharmaceutical benefits. It is submitted that effect can be given to the introduction of the words "the provision of" only by treating the power as limited to the provision *by the Commonwealth* of the various benefits referred to in par. (xxiiiA.). An analogy may be suggested between par. (xxiiiA.) and par. (ii.) of s. 51. Under par. (ii.) the Parliament has power to make laws with respect to taxation. It has always been considered that this is a power to make laws with respect to taxation by the Commonwealth, and that it would not authorize Federal laws prescribing the forms or methods of taxation by the States or laws authorizing private persons to impose taxation. Similarly, it is contended, and in my opinion rightly contended, that the introduction of the words "The provision of" at the beginning of par. (xxiiiA.) produces the result that the new power given to the Commonwealth Parliament by this constitutional amendment is a power to make laws with respect to the providing by the Commonwealth of the benefits mentioned in the paragraph. Under this paragraph the Commonwealth Parliament could not make a law requiring States or corporations or individual persons to provide maternity allowances, widows' pensions, child endowment, or any other of the benefits specified in the paragraph.

(2) The Act the validity of which is called in question in this case is entitled the "*Pharmaceutical Benefits Act*". The defendants, however, in supporting the validity of the Act, are not limited to defending the Act under the power to make laws with respect to the provision of pharmaceutical benefits. They may call in aid any other provision of the Constitution which would authorize any provision in the Act. Thus, as has already been stated, there may be sickness benefits which are not pharmaceutical in character. If

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

so, and the Act provides for them, the legislation would be authorized under the heading of sickness benefits, though not under the heading of pharmaceutical benefits. Similarly, it might be the case that a particular benefit provided by the Commonwealth under the Act was a medical service and not a pharmaceutical benefit in the form of some drug or medicine. If so, the portions of the Act containing such an enactment could be supported under the heading "The provision of medical services," even although the enactments were contained in a statute entitled "*Pharmaceutical Benefits Act*".

(3) If, as I think should be held, it is the case that the constitutional provision contained in par. (xxiiiA.) relates only to the provision of certain benefits by the Commonwealth, it follows that under this legislative power the Commonwealth Parliament could not prevent the provision of such benefits by any other agency, and therefore, for example, could not prevent the States, through their hospitals or otherwise, supplying benefits either identical with or different from those which were included within the Commonwealth scheme, as long as the Federal and State statutes, each positively providing for such benefits, were not inconsistent with each other. This proposition follows from the view that the legislative power is limited to the subject of provision by the Commonwealth and that it does not extend to provision by other agencies or by a private person. But the Act does not in my opinion in any of its provisions purport to exclude the States from the area of provision of pharmaceutical benefits. It gives State hospitals and the like and friendly societies organized under State law the opportunity of taking advantage of the provisions, but it is not the case that they are bound to do so under penalty of being deprived of necessary medicines &c. There is nothing in the Act which would prevent a State hospital obtaining and dispensing its own drugs or which would prevent a friendly society from obtaining and distributing its own drugs and medicines through a friendly society dispensary. This view depends upon the interpretation of s. 8 of the Act, which I have already examined. As I have said, in my opinion s. 8 does not produce the result that the drugs &c. specified in the formulary or the addendum cannot be obtained from or delivered by an approved pharmaceutical chemist or other chemist except upon a prescription written upon a Commonwealth form which entitles the recipient to receive the drugs or medicines without payment. If persons or institutions choose to remain outside the benefits of the scheme there is not in my opinion anything in the Act to compel them to accept those benefits.

Thus, in my opinion, the Act does not in any way assume Commonwealth control of State institutions such as hospitals &c. It only offers to them an opportunity of coming into the Commonwealth scheme if they think fit. It may particularly be observed in relation to State hospitals that s. 12 provides for applications by hospital authorities for approval for the purposes of the Act in order that pharmaceutical benefits under the Act may be supplied to patients in a hospital. If a hospital does not apply for approval the Act has no application to it—but the hospital will not get its medicines free under the Act. Similar considerations apply to friendly societies by reason of the provisions of s. 10 read together with s. 9.

(4) But, as already stated, if the Commonwealth legislation did affect or control the operations of State institutions, that fact would not necessarily establish the invalidity of the Commonwealth legislation. If the Commonwealth legislation is within the legislative power of the Commonwealth Parliament, then s. 109 of the Constitution brings about the result that it prevails over any inconsistent State legislation. In this case no such question arises as was discussed in *Melbourne Corporation* v. *The Commonwealth* (1) —a question as to interference by the Commonwealth with State governmental functions.

The Act in relation to the Constitution. The constitutional power is a power to make laws with respect to the provision of certain benefits, including pharmaceutical, sickness and hospital benefits and medical services. As far as pharmaceutical benefits (that is, the provision of drugs &c.) are concerned, provision might have been made for the supply of drugs and medicines by merely giving them away to all applicants without any precautions to secure that they were needed by or would be useful to the applicants. It is unlikely, however, that in the case of drugs and medicines any responsible parliament would adopt such a system of providing pharmaceutical benefits. The specification of the conditions upon which such benefits will be provided is part of any legislative scheme for the provision of those benefits; for example, it would be an obvious part of such a scheme to provide that no such benefit should be supplied except upon application, and upon application in a particular manner, and perhaps upon the recipient giving a receipt therefor, which receipt should be in a particular form. That is to say, some method of administration of the benefits is a part of any scheme for providing the benefits.

(1) (1947) 74 C.L.R. 31.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

The Commonwealth could set up a department which would distribute drugs &c., and that would be an actual means of providing the benefits. But the Commonwealth is not bound to do this in order to exercise the legislative power. The Commonwealth Parliament can in my opinion take the position in the community as it finds it, namely that doctors prescribe medicines by means of prescriptions, and that chemists make the prescriptions up and supply the medicines &c. to the patients. In order to prevent injury to the public and in order to secure real benefit for the people, the Parliament can in my opinion impose as a condition of receiving the benefit that no benefit should be provided under the Act except upon the prescription of a legally qualified medical practitioner and by a duly qualified pharmaceutical chemist. All such legislative provisions are an actual part of a system of providing the benefits referred to in par. (xxiiiA.) of s. 51. They constitute precautions and limitations within the system itself.

Under s. 51 (xxxix.) of the Constitution Parliament has power to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament of the Commonwealth or in any department or officer of the Commonwealth. Thus the Parliament may make provision for matters which arise in the exercise of a power which is granted to the Parliament (*Le Mesurier* v. *Connor* (1)).

It is incidental to the exercise of any power to provide benefits out of public moneys that there should be some precautions against fraud by the recipients, and generally that there should be a means of administering the distribution of the benefits so as to prevent the useless or dishonest expenditure of such moneys. It is essential for these purposes that provision should be made to prevent administrative confusion arising in the execution of the scheme. A free medicine scheme applying to all persons resident in Australia applies to over seven million people. Many of these, unfortunately, have to obtain many doctors' prescriptions in the course of a year, and it would be safe to say that in any efficient administration of such a scheme it would be necessary to examine and check a very large number of prescriptions upon which medicines had been supplied. Accordingly, it is incidental to the exercise of this particular legislative power that Parliament should, if it thought proper, provide that prescriptions should be written in a particular manner and that they should be made readily identifiable by the use upon them of numbers or other symbols which are set forth in a formulary, and that they should be written in duplicate upon forms officially

(1) (1929) 42 C.L.R. 481, at pp. 497, 498.

provided which can be conveniently registered, recorded, and kept for as long as is thought proper in the administrative department. Such provisions may reasonably be considered to be desirable, or even necessary, in order to provide the records which would be required by any form of responsible administration of the system and for the purpose of requiring proper safeguards in the expenditure of public money.

At present I am considering the Act without any reference to the provision in the Constitution with reference to civil conscription. But even in the case of legislation which is subject to this limitation there is, in my opinion, no reason why the Commonwealth Parliament under the power to make laws for the provision of pharmaceutical benefits should not make laws to require doctors in their practice to write all prescriptions for drugs and medicines &c. within a prescribed formulary &c. on official forms if they and their patients wish formulary medicaments &c. to be supplied gratuitously.

But it is one thing to provide as a condition of giving a pharmaceutical benefit that a prescription shall be written on a particular form, and another thing to provide that a doctor shall write any prescription for medicines which are included within a formulary upon a particular form, whether or not such medicines are to be supplied free under the Act. Section 7A (1) is a provision of the latter description. It cannot in my opinion be supported under the power to make provision for "medical services," although the writing of a prescription is a necessary part of very many medical services. It cannot be supported under this part of par. (xxiiiA.) because it has no relation to any provision *by the Commonwealth of the medical service* of writing a prescription. I have already stated my reasons for the opinion that par. (xxiiiA.) relates only to provision by the Commonwealth, and not by, e.g. doctors in private practice, of medical services.

But under a power to make provision by the Commonwealth for pharmaceutical benefits, the Parliament could (apart from the limitation with respect to civil conscription) validly require persons, including doctors, to give their services in carrying out the scheme adopted by Parliament. Compulsory service in relation to this subject matter of Federal legislation would be as valid as compulsory service in relation to defence.

For these reasons I have reached the conclusion that all the challenged provisions of the Act are valid unless they are rendered invalid by the words "but not so as to authorize any form of civil conscription."

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

Civil Conscription. It is convenient here to repeat the words of the Constitution, s. 51 (xxiiiA.). This paragraph confers power upon the Commonwealth Parliament, to make laws with respect to—"The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances:". It was assumed without argument (and I think rightly) that the words "but not so as to authorize any form of civil conscription" are consecutive and not final in significance: they are used to describe a result or consequence, not a purpose or design. Three questions arise in the present case with respect to this provision—(1) What is the meaning of "civil conscription"? (2) Does the limitation prohibiting civil conscription apply only to the immediately preceding words "medical and dental services," or does it also limit legislative power with respect to the other subjects mentioned in the paragraph, including pharmaceutical sickness and hospital benefits? (3) If the latter interpretation is that which should be adopted, do the *Pharmaceutical Benefits Act* 1947-1949 or the regulations thereunder infringe the prohibition in any and which of their provisions?

(1) The word "conscription" etymologically considered relates only to writing names together upon a list: see *Latin Dictionary, Lewis & Short, sub voce "conscribo."* Thus the Conscript Fathers in republican Rome were the seniors whose names were on a list of those summoned to the Senate. In both ancient and modern use "conscription" has been principally applied as a convenient term for the purpose of describing compulsory enlistment for military or similar services. In recent years there have been many examples of compulsion of other services for war or other purposes. Such compulsion in relation to industry has been described as "conscription of labour" and "industrial conscription." Conscription of labour assumes various forms—forced labour camps containing prisoners of war or foreigners or enemies or critics of a government behind barbed wire are one form of conscription of labour. Man-power regulations provide another form. The latter provisions were regarded in Australia as industrial conscription: see *National Security Act* 1939-1946, s. 5 (7). Section 5 provided for the making of regulations under the Act, and sub-s. (7) provided that nothing in the section should authorize—"(*a*) the imposition of any form of compulsory naval, military or air-force service, or any form of industrial conscription . . ." When Parliament became of opinion that it was desirable or necessary to compel persons to

render service in particular occupations for the purposes of prosecuting the war and supplying the needs of the population, civil and military, s. 13A was introduced into the Act. This section provided that "Notwithstanding anything contained in this Act, the Governor-General may make such regulations for requiring persons to place themselves, their services and their property at the disposal of the Commonwealth, as appear to him to be necessary or expedient for securing the public safety. . . ." It was under this power that the Manpower Regulations, which were considered and upheld in *Reid* v. *Sinderberry* (1) were made.

The words "but not so as to authorize any form of industrial conscription" were included in a proposed law to alter the Constitution by empowering the Parliament to make laws with respect to the terms and conditions of employment in industry. This proposed law was passed by Parliament but was rejected upon a referendum in 1946.

The words used in s. 51 (xxiiiA.) relate to "civil conscription." The term "civil conscription" is wider than industrial conscription. It is applicable in the case of any civilian service, i.e. non-military, work or service. It could properly be applied to any compulsion of law requiring that men should engage in a particular occupation, perform particular work, or perform work in a particular way. There are, however, many laws which control the rendering of services of one kind and another which could not be described as civil conscription. For example, a law which provides that no person shall make up prescriptions or sell certain articles unless he is a qualified chemist is a law which controls the sale of those articles and the occupation of a pharmaceutical chemist, and a State Parliament can make such a law. But that law would not compel anybody to work as a pharmaceutical chemist. Similarly, a law that persons shall not practise as medical practitioners unless they are qualified in a particular manner and registered is a law which controls medical practice, and a State Parliament can make a law of this character. But that law would not compel any person to practise as a doctor. The Commonwealth Parliament could not make such laws. They would not be laws for the provision of any service by the Commonwealth.

Conscription (compulsory service) may be complete or partial. It may control a man in relation to all his services in a particular occupation to which he is assigned, or it may control only some of the services rendered or the work done by him in that occupation. In my opinion the limitation imposed by the words "but not so as

(1) (1944) 68 C.L.R. 504.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

to authorize *any form* of civil conscription " were intended to prevent, not only civil conscription in its complete form of enrolment of masses of men for compulsory full-time civilian service, but also to prevent any form whatever of compulsion to render any particular civilian service to the community. The words " any form " are important. They show that the Parliament intended that any service to which the limitation applied should be completely voluntary and not procured by compulsion of law.

(2) The next question is whether the words " but not so as to authorize any form of civil conscription " apply only to the provision of medical and dental services or to the provision of each of the other benefits mentioned, i.e. so far as such provision may involve the rendering of services or the performance of work, for " conscription " can be applied only in relation to services and work.

If there had been a comma after the word " services " it probably would not have been argued that the words within the brackets referring to civil conscription did not apply to all the beforementioned subject-matters of legislation. An important constitutional question should only in the last resort be decided upon the presence or absence of a comma. It is in my opinion better to look at the whole substance of the relevant provision than to begin by regarding only the punctuation of the paragraph.

Civil conscription could in practice be applied in making provision for hospital and sickness and pharmaceutical benefits as well as in providing medical and dental services. Such conscription was so applied in the recent war when doctors and nurses and chemists were called up for service. A provision in a Federal law requiring doctors or nurses, pathologists or bacteriologists, radiologists or chemists to render service under a Commonwealth scheme would be a form of civil conscription, whether the scheme provided for hospital benefits or sickness benefits or pharmaceutical benefits. No reason has been suggested other than the absence of a comma after the words " medical and dental services " why civil conscription of doctors or dentists should be prohibited in legislation relating to doctors or dentists passed under the power to make provision for " medical and dental services," but that doctors and dentists should be compellable to serve in a particular way in relation to the provision of pharmaceutical benefits or sickness or hospital benefits. In my opinion the words " but not so as to authorize any form of civil conscription " should be read as imposing a limitation upon the power of legislation with respect to all the matters mentioned which precede those words so far as they may involve service or work, and therefore as limiting the legislative power to make laws

with respect to the provision of pharmaceutical, sickness and hospital benefits, and not as limiting only the power to make provision for dental and medical services.

(3) Do the Act or regulations impose "any form of civil conscription"? Section 7A requires doctors (in the absence of a contrary request in accordance with s. 7A (2)) to write their prescriptions upon a Commonwealth form when the doctor prescribes any of the drugs or other articles specified in the Commonwealth formulary or the addendum thereto, and the regulations require him to identify the prescription by reference to the symbol attached to it by the regulations. Plainly the writing of a prescription is the performance of a service. It is essentially a service performed by a doctor, and it is necessarily involved in any sensible scheme of providing free medicine. But, as already stated, the writing of a prescription to which s. 7A refers is not a medical service which is provided by the Commonwealth. The patient, in the ordinary case to which s. 7A applies, employs the doctor and is bound to pay him for his services. The doctor provides the service in return for the payment (or promise of payment) of a fee. The Commonwealth does not provide the service. For this reason s. 7A cannot be supported by the provision in s. 51 (xxiiiA.) relating to the provision (that is the provision *by the Commonwealth*) of "medical and dental services," and it can be justified, if at all, only under some other heading of par. (xxiiiA.). Is it then authorized by the words relating to pharmaceutical sickness and hospital benefits—the only other possibly relevant categories?

Section 7A is a provision compelling a doctor who is in practice to practise his profession, in so far as the important element of writing prescriptions is concerned, in a particular way. If this is not a form of civil conscription, it would equally not be a form of civil conscription in relation to "medical services" to prescribe by law that a doctor should carry on his practice at a particular place, or at a particular time, or for a particular class of patients and not for other patients, and that he should follow a prescribed routine in dealing with his patients. If laws imposing such requirements were held not to be civil conscription the result would be that, without infringing the prohibition of civil conscription, the whole practice of a doctor could be completely controlled, not merely by negative provisions, but also by positive provisions requiring him to do certain acts in his practice.

If the doctor prescribes a formulary medicament and does not write it upon a government form in accordance with the Act and the regulations and there is no request from the patient or person

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Latham C.J.

requesting the prescription that he should write it upon another form, he is liable to a penalty of £50 under s. 7A (2).

Section 7A should be considered, not *in vacuo*, but as applying to an existing medical profession. It is true that the doctor may escape the penalty by not writing a prescription. The allegations in the statement of claim, however, are to the effect that a doctor could not carry on practice without writing many prescriptions which are included in the formulary. Accordingly, the doctor is not given any live option. He must, in the absence of a request from the patient or other person (which, as already stated, he has no power or right to procure or control), either use the Commonwealth forms or go out of practice. This is a very real power of compulsion. There are various ways of compelling people to a course of action. The imposition of a penalty or imprisonment is a common form of compulsion.

In the Thirteenth Amendment of the Constitution of the United States of America there is a provision—"*Section* 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. *Section* 2. Congress shall have power to enforce this article by appropriate legislation." This prohibition has been construed broadly so as to give effect to its evident purpose and to prevent evasion by the creation of crimes in relation to acts or omissions which are connected with the rendering of services. In a statute passed to enforce this article of the Constitution the Congress provided that any State laws establishing or enforcing peonage—voluntary or involuntary service in liquidation of a debt or obligation—should be null and void. In *Alonzo Bailey* v. *State of Alabama* (1) the Supreme Court said:—"The Act of Congress, nullifying all state laws by which it should be attempted to enforce the 'service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise,' necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it. Such laws would furnish the readiest means of compulsion." The fact that a peon could release himself by the payment of his debt did not make his service any the less compulsory (2). In *United States* v. *Reynolds*; *United States* v. *Broughton* (3) the Court said:—"Compulsion of such service by the constant fear of imprisonment under the criminal laws renders

(1) (1911) 219 U.S. 219, at p. 243 [55 Law. Ed. 191, at p. 203].
(2) (1911) 219 U.S., at p. 243 [55 Law Ed., at p. 203].
(3) (1914) 235 U.S. 133, at p. 146 [59 Law. Ed. 162, at p. 167].

the work compulsory, as much so as authority to arrest and hold his person would be if the law authorized that to be done." No distinction in this connection can be drawn between fear of imprisonment and fear of a fine. These cases show that the court regarded the substance of the legislation, as determined by its actual operation in the circumstances in which it applied, in reaching a conclusion as to whether or not a law established involuntary servitude.

So also in the case of "civil conscription" this Court should consider the operation of the Act in relation to the persons upon whom a penalty would be imposed in the case of a breach of s. 7A. Those persons are doctors who earn their living by practising medicine. Recent experience in Europe has shown that the most successful means of compulsion of services is to be found in the deprivation of means of subsistence. There could in my opinion be no more effective means of compulsion than is to be found in a legal provision that unless a person acts in a particular way he shall not be allowed to earn his living in the way, and possibly in the only way, in which he is qualified to earn a living.

I summarize my opinion upon this question in the propositions that the prohibition of "any form" of civil conscription prevents any compulsory service being required under a Federal law for the provision of pharmaceutical benefits, that the prohibition applies to piecemeal as well as to whole-time compulsion, and that in determining whether there is compulsion it is proper to consider not only the bare legal provision but also the effect of that provision in relation to the class of persons to whom it is applied in the actual economic and other circumstances of that class.

In my opinion s. 7A does impose a form of civil conscription.

I am therefore of opinion that s. 7A of the Act is invalid. The terms of the constitutional amendment shew a concern to avoid in the application of legislation which might be passed under the new constitutional power any form of compulsion of services in relation to the subject-matter of such laws. The object of conferring power upon the Commonwealth Parliament to make laws for the provision of pharmaceutical benefits was to enable the Parliament to make laws with respect to (*inter alia*) the provision of pharmaceutical benefits by the Commonwealth under a scheme which should involve no compulsion of service by any person, which would leave every person, according to his own will, and not by reason of the exercise of the will of Parliament or of any other person, at liberty to take part in the execution of the scheme or to stand outside the scheme altogether, whether as doctor, as chemist or as patient.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

In my opinion the validity of s. 7A does not affect the validity of any of the other provisions of the Act. If s. 7A is struck out of the Act, the rest of the Act will work as a completely voluntary scheme, chemists, doctors and patients utilizing or taking the benefit of the scheme each according to his own individual choice. In my opinion the demurrer should be overruled.

RICH J. The demurrer in this action raises a question which is of great importance, not only to the community in general, but to the medical profession in particular. And I premise my judgment by venturing to repeat that a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret: (*Vacher & Sons Ltd.* v. *London Society of Compositors* (1); *McCawley* v. *The King* (2); *Ex parte Walsh and Johnson*; *In re Yates* (3)). Our duty is to interpret the Act. The Act in question the validity of which is attacked is the *Pharmaceutical Benefits Act* 1947-1949 which was passed in purported exercise of the power conferred on the Commonwealth Parliament by par. (xxiiiA.) of s. 51 of the Constitution. This addition to the Constitution was the result of the decision of this Court in *Attorney-General (Vict.)* v. *The Commonwealth* (4). In that case the majority of the Court held in effect that the original *Pharmaceutical Benefits Act* 1944 was invalid because it was considered that the power of appropriation of money under s. 81 of the Constitution did not extend to payments for maternity allowances, child endowment and widows pensions, social services being limited by s. 51 (xxiii.) to invalid and old age pensions. Its object was to increase the social services beyond those already provided for by par. (xxiii.) of s. 51. The new provision added to the Constitution in 1946 reads:—"The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances." In the first place in interpreting this provision I consider that the provision of these services is to be by the Commonwealth and not by any State or other person. Then I think that the bracketed phrase "but not so as to authorize any form of civil conscription" is restricted to the phrase "medical and dental services." Although punctuation is not to be entirely disregarded, it should not control the meaning of the words where such meaning seems otherwise reasonably clear: *Mayor, &c. of Geelong* v. *Geelong Harbour Trust*

(1) (1913) A.C. 107, at p. 118.
(2) (1918) 26 C.L.R. 9, at p. 45.
(3) (1925) 37 C.L.R. 36, at p. 126.
(4) (1945) 71 C.L.R. 237.

Commissioners (1); *President, &c. of the Shire of Charlton* v. *Ruse* (2); *Committee of Direction of Fruit Marketing* v. *Collins* (3). In addition to its punctuation the form and structure of the phrase lead me to the construction I have adopted. But I disclaim any suggestion that the spasmodic sprinkling of commas by draftsmen, printers or proof readers should dominate interpretation. The phrase "civil conscription" next calls for interpretation. It is somewhat of a novelty. Military conscription and industrial conscription are familiar combinations. The draftsman apparently shied at the naked simplicity of the word "compulsion," but I think that the phrase means compulsion in connection with "medical and dental services." Turning to the Act the crucial question is whether s. 7A imposes civil conscription as thus interpreted. The Chief Justice and *Dixon* J. have dealt fully with the details involved in the controversy. I have confined my judgment to what I conceive to be the crucial question in this matter, namely, whether the provisions of s. 7A of the Act can be regarded as a form of civil conscription. The demurrer of necessity admits all the allegations in the statement of claim. And I would particularly refer to the following paragraphs of the statement of claim:—"8. Uncompounded medicines, medical compounds, medical materials and medical appliances are hereinafter referred to as 'medicaments.' Medicaments the names or formulae of which are contained or deemed to be included in the Commonwealth Pharmaceutical Formulary referred to in the Act and Regulations and hereinafter called 'The Formulary' or in the prescribed addendum thereto are hereinafter referred to as 'formulary medicaments'. Medicaments the names or formulae of which are not so contained or deemed are hereinafter referred to as 'extra-formulary medicaments.' 9. A large part of the professional work done by doctors consists of prescribing for the supply to their patients of such one or more, or such combinations of two or more, of the medicaments comprised in the following classes as in the opinion of doctors is or are in each case necessary or advisable for the proper medicinal treatment of the patient: (*a*) formulary medicaments; (*b*) medicaments, either formulary or extra-formulary, specified to be supplied in the form of a particular trade mark, brand, make or proprietary equivalent and in no other form; (*c*) extra-formulary medicaments consisting of medicinal compounds compounded according to formulae contained in the Formulary with variations other than those specified by the Regulations as being permitted variations of those

(1) (1923) V.L.R. 652, at p. 657.
(2) (1912) 14 C.L.R. 220, at p. 230.
(3) (1925) 36 C.L.R. 410, at p. 421.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Rich J.

formulae; (*d*) other extra-formulary medicaments. 10. A large number of the medicaments prescribed by doctors for supply to patients are formulary medicaments. No doctor could carry on the practice of his profession with due regard to the proper medicinal treatment of his patients or at all if he were unable lawfully to prescribe all formulary medicaments and all medicaments comprised in any other of the abovementioned classes. . . . 12. On the coming into operation of all the provisions of the Act the plaintiff doctors will be substantially prevented from and hindered in practising and carrying on their professions and hindered in the proper medicinal treatment of their patients by (*inter alia*) the requirements of the Act and the Regulations relating to the writing of prescriptions, the repeating of prescriptions, the quantities of formulary medicaments that may be prescribed, the prescription of formulary medicaments in the form of a particular trade mark, brand, make or proprietary equivalent, and the permitted variations of formulae contained in the Formulary." The question is one of law and, as I have said, this question is the proper construction of s. 7A. It is true that no one is compelled to adopt the profession of medicine. But if he does do so he is affected in his freedom of practice and in his means of living unless he subscribes to the scheme whereby he is subject to control as to the form of the treatment and the drugs which he may prescribe for his patient. For the general practitioner non-compliance means loss of practice. The use of a particular form or the signing of a prescription is no mere automatic action. It is the result of the practitioner's examination and overhaul of the patient, diagnosis of the complaint and the choice of the treatment, drugs, materials and appliances which his knowledge and skill dictate. It is the culmination of the medical service rendered by the practitioner to the patient. This may perhaps not be compulsion in the sense in which the word is used in connection with military service but, in my opinion, it is a form of civil conscription.

An extremely important consideration which cannot be disregarded is the confidential relationship of doctor and patient, a relationship akin to that of solicitor and client and priest and penitent. To disregard this relationship compels a doctor to abandon his normal duties and obligations to his patient.

I would overrule the demurrer.

DIXON J. The object of this suit is to obtain a decision upon the validity of the *Pharmaceutical Benefits Act* 1947-1949 or of certain parts of the Act and of the *Pharmaceutical Benefits Regulations*.

The matter is brought before us by a demurrer to the statement of claim.

The first plaintiff named in the writ is the Federal Council of the British Medical Association in Australia, a body incorporated under the law of New South Wales, one of the objects of which is to advance the general interests of the medical profession in Australia. It may be doubted whether this body has, as a corporation, a sufficient material interest, which would be prejudiced by the operation of the Act, to give it a title to maintain the suit (see *Real Estate Institute of New South Wales* v. *Blair* (1)). But the point is of no importance, because there are six other plaintiffs all of whom practise medicine or surgery. The interest which they have is enough to enable them to complain, if the legislation is invalid as a whole or if severable provisions are invalid which would directly affect the practice of medicine or surgery. It is hardly necessary to add that if provisions of the Act or Regulations which would not in themselves affect the plaintiffs and do not touch the practice of their profession are found to be severable so that the operation of other parts of the Act or Regulations is not dependent upon them, the interest of the plaintiffs will not enable them to obtain a declaration concerning the validity of such provisions. It is convenient to illustrate this by the example which is supplied by s. 13 (1), (2), (2A), (2B) and (2C) of the *Pharmaceutical Benefits Act* 1947-1949. Sub-section (1) of s. 13 enables the Director-General for good cause shown to suspend or revoke his approval of a pharmaceutical chemist, of a hospital authority or of a medical practitioner who practises in an area where there is no pharmaceutical chemist and who has been approved for the purpose of supplying pharmaceutical benefits. Sub-section (2) purports to give an appeal to the Supreme Court of a State against the suspension or revocation of the approval, and sub-s. (2A) purports to invest the Supreme Court of each State with jurisdiction to hear and determine the appeals. Sub-sections (2B) and (2C) deal with the powers of the Court and with procedure upon such appeals.

The contention was advanced that sub-ss. (2), (2A), (2B) and (2C) are attempts to confer an authority and impose a duty of an administrative kind upon State Courts and so go beyond the power given to the Parliament by s. 77 (iii.) of the Constitution and cannot be supported. It is a suggestion not lightly to be rejected. For apparently, even if the Supreme Court were to find in any given case that some objective good cause existed, then, according to the intention of the provision, it would remain for the Supreme Court

(1) (1946) 73 C.L.R. 213, at pp. 227, 228.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Dixon J.

to exercise an undefined discretion concerning the suspension or withdrawal of the approval of the appellant. But I think that it is reasonably clear that if the provisions of sub-ss. (2), (2A), (2B) and (2C) proved invalid as an attempt to authorize and require the Supreme Courts of the States to perform a function outside judicial power, the invalidity would not involve more of the Act than sub-s. (1) and so much of the operation of sub-s. (4) as relates to sub-s. (1) as distinguished from sub-s. (3). It is not alleged that any of the plaintiffs practises in a particular area in which there is no approved pharmaceutical chemist and, even if he did, it would not give him a sufficient present interest to raise, as an independent question, the validity of the attempt to give a right of appeal if the double contingency should occur in the future of his being approved for the purpose of supplying pharmaceutical benefits and of his approval subsequently being revoked or suspended. It follows that, since s. 13 (1), (2), (2A), (2B) and (2C) are, as I think, severable from the rest of the Act so that their invalidity would not bring the rest of the Act down, the question whether they are invalid does not arise in this suit for determination. The question of their validity is therefore to be put on one side.

The suggestion that they are invalid provides an illustration, and a not unimportant one, of the fact that what is before the Court for decision is the validity of the Act as it affects the practice of medicine. Every provision of the Act and of the regulations received some examination during the argument of the demurrer. Apart from the general attack upon the Act, separate questions were raised about the validity of not a few of them. This was both natural and proper. But unless the provisions affect medical practice or are inseverable from others which do, the extent of their own separate intrinsic validity must, as in the example I have taken, be an abstract or hypothetical question outside the scope of the suit. What the suit is concerned with is the provisions which directly affect medical practice and with the indispensable elements of the plan to which the legislation seeks to give effect. As the *Pharmaceutical Benefits Act* 1947-1949 and the *Pharmaceutical Benefits Regulations* now stand, there can be no doubt that both in its direct and in its consequential operation, the plan which the chief provisions embody must touch the practice of medicine and affect the interests of the plaintiffs. Accordingly there was no denial of the competency of the plaintiffs to maintain the suit.

The question whether the main provisions of the Act and regulations are valid depends upon the legislative power conferred upon the Parliament by the amendment called *Constitutional Alteration*

(*Social Services*) 1946, and upon the application if any of s. 51 (xxxi.) of the Constitution to the legislation.

Like all other legislative powers, the power conferred by the amendment includes matters that are incidental to the expressed purpose of the power. Like other legislative powers it does not take the form of a definition, framed with any attempt at precision, of the kind or kinds of law that may be made under it. It does resemble other powers in consisting in the names of specified subject matters designated in the briefest terms. Indeed there is a list of such designations. But it differs from other powers in two respects.

In the first place the power is not to legislate simply upon the matters so named. It is a power to legislate with respect to "the provision of" such matters. In the second place it contains a qualification of an unexampled kind, introduced by the words "but not so as to authorize." Eleven things are named in respect of the provision of which the Parliament is empowered to make laws. Paragraph (xxiiiA.) enables the Parliament to make laws with respect to the provision of (1) maternity allowances, (2) widows' pensions, (3) child endowment, (4) unemployment benefits, (5) pharmaceutical benefits, (6) sickness benefits, (7) hospital benefits, (8) medical services, (9) dental services, (10) benefits to students, (11) family allowances.

The word "allowances" seems clearly enough to refer to monetary allowances and of course the word "pensions" denotes money payments. One of the meanings of the word "endow" is to provide or secure a permanent income for a person or an object. In the expression "child endowment" the word endowment is used in a corresponding sense with reference to periodical payments in respect of children. In 1929 there was a Royal Commission on "Child Endowment or Family Allowances." Valid or invalid, a Federal *Child Endowment Act* was passed in 1941 (No. 8) and the expression was familiar in State legislation. In the report by Sir William Beveridge on Social Insurance and Allied Services (1942) the expression chosen is "Children's Allowances."

The word "benefits" has a long history in the vocabulary of friendly and benefit societies as a general name for the payments in money and for the provision of medical attention, medicines and funeral arrangements made by such societies to or for their contributing members and their dependants in case of sickness or death. It is the word used in the *National Insurance Act* 1946 of the United Kingdom to cover medical treatment and attendance, periodical payments during incapacity through disease or bodily or mental disablement, a payment called maternity benefit and

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

DIXON J.

certain other payments and provisions, such as for nursing, for dental treatment and for periods of convalescence. The word was used in the Federal *Unemployment and Sickness Benefits Act* 1944 as well as in the *Pharmaceutical Benefits Act* 1944. The general sense of the word "benefit" covers anything tending to the profit advantage gain or good of a man and is very indefinite. But it is used in a rather more specialized application in reference to what are now called social services; it is used as a word covering provisions made to meet needs arising from special conditions with a recognized incidence in communities or from particular situations or pursuits such as that of a student, whether the provision takes the form of money payments or the supply of things or services.

The introductory expression in par. (xxiiiA.) "the provision of," governed as it is by the words "with respect to," might conceivably be read as giving a power to legislate about the providing of the allowances, benefits and services to which the paragraph refers whoever did the providing. If it were read thus it would extend to legislation dealing directly and substantially and not merely incidentally, with provisions made by State Governments, public bodies, voluntary associations, trading companies and private persons for any of the purposes enumerated, however limited the application of the provision. It would follow that these governments, bodies and persons might, by legislation under the power, be compelled to make such provision in accordance with whatever obligations the Parliament thought fit to impose upon them. But I am clearly of opinion that this is not the true meaning of the words "with respect to the provision of." The purpose of the constitutional amendment was to enable the Commonwealth to provide the pensions allowances endowments benefits and services which par. (xxiiiA.) mentions. That is shown by the character of the things for the provision of which laws may be made, which are recognized social services the establishment of which is now considered to be within the province of government. The conclusion is confirmed by the history of the matter; and it is supported by the placing of the new paragraph after s. 51 (xxiii.), which deals with invalid and old age pensions. The meaning appears to me to be the same as if the power had been expressed as one to make laws to provide &c. It might have been so expressed had it not been for the words "in respect of" at the head of the section. These words made the use of a substantive or verbal noun necessary and doubtless this accounts for the choice of the words "the provision." But to say that the meaning is the same as if the power had been one to provide the benefits &c. enumerated is not to restrict the

Commonwealth to providing them directly and at the expense of the Treasury. The power perhaps might, for example, cover the establishment of contributory schemes; and it would cover the provision of benefits &c. through separate bodies set up for the purpose.

The qualification of the power introduced by the words "but not so as to authorize" to which I have referred occurs after the words "medical and dental services." Enclosed in brackets are the words "but not so as so authorize any form of civil conscription." The paragraph is punctuated with a comma before the word "medical" and with the next comma after the brackets are closed. So, if the punctuation is to govern the construction, the words in brackets qualify only the expression "medical and dental services" and not the preceding expressions amongst which the words "pharmaceutical benefits" occur. That this is intended is shown by the fact that the bracketed words are not placed at the end of the paragraph, that is after the words "family allowances." The purpose no doubt was to prevent laws made with respect to medical or dental services imposing duties which would amount to "a form of civil conscription." The inference is, I think, that it was not supposed that a legislative power with respect to the provision of the allowances, pensions, endowments and benefits that are mentioned in the paragraph as distinguished from "services" could extend to the imposition of duties amounting to a form of civil conscription. If so, the assumption supports the view that the paragraph authorizes only laws with respect to provisions made or established by the Commonwealth.

The expression "not so as to authorize" seems to mean that the grant of the power to the Parliament shall not authorize the Parliament to impose any form of civil conscription. But the grammatical place and the form of the qualification strictly mean that the law made by the Parliament itself shall not authorize the imposition of a form of civil conscription, by, I suppose, the executive. In its application to the legislation under consideration the distinction makes no difference in the result. Much depends, however, upon the meaning of the words "any form of civil conscription." This vague and figurative expression carries with it no clear conception. From the power to make regulations conferred upon the Governor-General in Council by s. 5 of the *National Security Act* 1939 there was a parallel exclusion of any form of industrial conscription. The meaning of this expression was never elucidated but perhaps it inspired the bracketed exception in s. 51 (xxiiiA.). No one would doubt that an attempt to impose upon a medical practitioner or a

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Dixon J.

dentist an obligation to serve in the employment of the Government would fall within the words. Nor, I suppose, would there be any doubt that they would cover any attempt to impose upon a medical man a duty of attending patients for fees paid or provided by the Government. But the question is whether an incidental interference in the complete freedom of medical practice involves a form of civil conscription. It is suggested that the word "civil" is used merely to ensure that medical men and dentists will remain liable to military conscription. I think it does something more than that. The word "conscription" has no proper application except to compulsory enlistment for the armed services. Like the word "draft," which too properly applies only to obligatory military service, it has a metaphorical use. A man who is pressed into any task or work or is required to accept any office is said to be drafted for it, a use of the word which is common in the United States. When the word "conscription" is taken from its primary use and the word "civil" is added to it the compound expression seems to me to indicate a single conception. It is described by a metaphor and therefore must rest upon analogy. The difficulty is that, so far as I am aware, it is not an expression which has gained general currency or has acquired a recognized application. Mr. *Sholl*, who appeared for the State of Victoria intervening, said that "any form of civil conscription" included any compulsion legal or practical by Commonwealth law to do in a civil capacity any act in the course of medical practice for the purpose of the provision of medical services. This of course was not intended to be an exhaustive definition, but it brings out clearly what perhaps in this case is the critical question concerning the meaning of the expression. It does so because it insists that if compulsion is applied to any act, that is any separate thing, it will amount to a form of civil conscription, provided the act is in the course of medical practice and for the purposes of the provision of medical services. The question which this brings out is whether the isolation of an incident in medical practice and the imposition of a duty in reference to what is done can fall within the conception described by the words "any form of civil conscription," or whether on the other hand compulsory service or the compulsory performance of a service or services is not connoted. The meaning of indefinite expressions cannot often be determined in the abstract. It is only by settling what application an expression like "civil conscription" has to definite situations that its exact scope can be worked out. In the present case the particular problem presented is whether the specific requirement imposed by s. 7A of the Act and reg. 11 as to the use of forms for

the writing of prescriptions and to the manner of doing it amount to an attempt at a form of civil conscription. This question can better be dealt with after I have expressed my opinion upon the validity of the Act and regulations considered generally. Therefore, with these preliminary observations upon the verbiage employed in s. 51 (xxiiiA.), I shall proceed to the consideration of that subject.

The plan of the *Pharmaceutical Benefits Act* 1947-1949 depends upon the promulgation of a list of uncompounded medicines and of formulae of medical compounds and of another list of " materials and appliances." The first list is called the Commonwealth Pharmaceutical Formulary and the second the addendum thereto. The lists are prescribed by regulations made by the Governor-General in Council. The Act calls the things on the two lists pharmaceutical benefits : s. 6. There is no harm in this choice of terminology so long as it is not supposed that the same words in the Constitution have the same meaning.

Then there is a general declaration that every person ordinarily resident in the Commonwealth shall be entitled to receive pharmaceutical benefits in accordance with the Act : s. 7 (1) and s. 4 (2). Exceptions may be prescribed and the provision itself excepts persons occupying a bed in a public ward of a public hospital. Pharmaceutical chemists, on their application, are to be approved by the Director-General of Health in respect of particular premises for the purpose of supplying in accordance with the Act pharmaceutical benefits at and from those premises : s. 9 (1) and s. 4 (2). Then when he does supply pharmaceutical benefits in accordance with the Act a chemist is entitled to payment in respect thereof from the Commonwealth in accordance with the regulations : s. 14 (1) and s. 4 (2). Payments are to be made out of the Trust Account called the National Welfare Fund : s. 17. The rates of payment are fixed by regulations : s. 14 (1), s. 23 (*c*), reg. 31. The approved chemist may not demand or receive any other payment in respect of the supply in accordance with the Act of a pharmaceutical benefit : s. 7 (3). Exceptions may be prescribed and certain exceptions have been made. They consist in special charges for the supply of medicine outside ordinary hours or for delivery : s. 7 (4) and reg. 13.

But no person is entitled to receive in accordance with the Act a pharmaceutical benefit from an approved chemist except on presentation of a prescription written and signed by a medical practitioner. The prescription must, subject to prescribed exceptions, be on a form supplied by the Commonwealth for the purposes of the Act : s. 8 (1). Further, a person is not entitled to receive a

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Dixon J.

pharmaceutical benefit from an approved chemist except at or from premises in respect of which he has been approved: s. 8 (1). From this it follows that in order to be entitled to receive payment from the Commonwealth the approved pharmaceutical chemist must (*a*) supply something on the formulary or the addendum; (*b*) supply it on presentation of a prescription from a medical practitioner; (*c*) supply it at or from the approved premises; (*d*) save in prescribed exceptional cases, act only on a prescription on a form supplied to medical practitioners by the Commonwealth. But if these conditions are fulfilled the approved chemist is forbidden to receive any payment for supplying the medicine or article except from the Commonwealth, though he may make a special charge for supplying it after hours or for delivery. The foregoing comprises the basal elements in the plan for pharmaceutical benefits which is embodied in the Act and regulations as they stood until amendments were made during this year. There are many additional matters provided for in the Act and regulations and some of them are drawn into the question of the validity of the legislation. But they do not in my opinion go to the essence of the plan. It is more convenient to deal with them separately.

It will be seen that unless medical practitioners when prescribing medicines contained in the formulary use the forms supplied for the purpose by the Commonwealth the approved chemist cannot supply the medicines free to his customer and obtain payment from the Commonwealth. Apparently it was assumed that medical practitioners would use the forms. But by Act No. 8 of 1949 a provision was inserted in the Act imposing upon them an express duty to use the forms when prescribing medicines, materials or appliances covered by the formulary or the addendum. This provision was replaced by a similar but more qualified provision substituted by Act No. 26 of 1949 and it is the latter with which we are concerned. It stands in the *Pharmaceutical Benefits Act* 1947-1949 as s. 7A. Its effect may be shortly stated thus. It makes it an offence for a medical practitioner to write a prescription on anything but a form supplied by the Commonwealth if the following conditions are fulfilled—(1) the person in respect of whom it is written is entitled to receive in accordance with the Act pharmaceutical benefits; (2) what is prescribed is covered by the formulary or the addendum; (3) either the person in respect of whom the prescription is written or the person at whose request it is written does not ask him not to write it on such a form; (4) the case does not fall under some prescribed exception. An exception has been prescribed when a medical practitioner considers it necessary to

write a prescription but a form is not immediately available. In that case he may use any suitable paper but he must state that a form is not available and entitle the prescription with the words "*Pharmaceutical Benefits Act.*" Afterwards he must give the chemist a prescription on a form—reg. 11 (4)-(6). The regulations direct that a prescription must be written on the prescribed form in duplicate and must be dated, and that not more than one prescription shall be written on a form and that a line shall be drawn through the unused portion of the form: reg. 11 (2). A medical practitioner is forbidden to use a prescription form for any purpose but writing a prescription for the purposes of the Act and from giving it or sending it to any other person except to another practitioner, and in that case he must keep a record of what he has given him: reg. 11 (3) and (9) and (10). By a recent amendment, the regulations impose upon the Director-General of Health an obligation to make available supplies of forms and to furnish them to medical practitioners on request: reg. 11A.

The provision of s. 7A and of the regulations dealing with the use and custody of prescription forms directly affect medical practice and it is upon these provisions that the attack was centred. Their validity was impugned on the ground that, considered as separate provisions, they went beyond the subject matter of Federal power and on the further ground that they were obnoxious to the restriction on power imposed by the words "but not so as to authorize any form of civil conscription." But it is apparent that these provisions are auxiliary only to the general plan, so that if in any essential respect the principal provisions of the Act are unconstitutional the auxiliary provisions will share in the invalidity because of their dependency. For this and, no doubt, other reasons, the validity of the whole Act and of its chief clause was impugned, independently of s. 7A and of the regulations dealing with the use and care of prescription forms.

In my opinion an examination of the grounds of this attack leads to the conclusion that it has no solid foundation. I think that the statute in its general conception and in its essential provisions is within power. It is a law with respect to the provision by the Commonwealth of pharmaceutical benefits. I do not say that there are not provisions which are too widely expressed or that every part of the Act and regulations is referable to that subject or is valid. But that is the main character of the legislation. I am unable to adopt the view that it amounts to a law with respect to drugs and medicines or a law to compel or to control the supply of drugs and medicines. The elements which give the legislation its true character

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

DIXON J.

lie in the provisions which entitle individuals to obtain from chemists medicines at the cost of the Commonwealth if they are prescribed by a medical practitioner. These provisions appear to me to constitute a law to provide pharmaceutical benefits. I am not prepared at present to subscribe to the doctrine that laws under s. 51 (xxiiiA.) can only provide drugs and medicines which the laws of the State for the time being permit. But let it be assumed that it is so. That only means that if the formulary compiled under s. 6 (1) (*a*) contains the names of medicines or formulae for medicinal compounds, which the law of the State prohibits, then the medical practitioner cannot prescribe them and the chemist cannot supply them.

The fact that s. 6 (1) (*a*) goes directly to medicines and medicinal compounds and calls them pharmaceutical benefits has not, in my opinion, any tendency to show that the Act is not one for providing pharmaceutical benefits as that phrase is used in par. (xxiiiA.). Section 21 (*a*), (*b*) and (*c*) and s. 23 (*e*) are merely ancillary and do not give the law any other character than one for the provision of pharmaceutical benefits. Possibly they or some of them are framed too widely, but the question whether that is so is of no importance. For clearly they are severable provisions and in any case s. 15A of the *Acts Interpretation Act* 1901-1948 would apply. Literally read, s. 6 (1) fails to confine the medicines and medicinal compounds which may be included in the formulary to those suitable to human beings or the materials and appliances to those which are used for purposes of the treatment, care, relief, comfort or assistance of the sick or injured or of others under physical disability. It was therefore said that the formulary and addendum might include veterinary medicines and every article pharmaceutical chemists sell and that a medical practitioner, finding them on the formulary, might think fit to prescribe any of them. Thus, it was contended, s. 6 (1) extended far beyond the power with respect to the provision of pharmaceutical benefits and as the plan of the legislation was, so to speak, developed from s. 6 its excessive width brought the Act down.

The short answer is that s. 6 (1) is not to be read with such intense literalness. The general words it contains are to be read in their context. The context includes a provision limiting the right to obtain a pharmaceutical benefit to cases where what is required has been prescribed by a legally qualified medical practitioner. Paragraph (*b*) of sub-s. (1) is severable and even if it were void its invalidity would not bring down the Act. But s. 15A of the *Acts Interpretation Act* 1901-1948 applies and makes it necessary to read the general words subject to the power and that means, in this

instance, the power to provide pharmaceutical benefits within the constitutional meaning of these words. The possibility of a medical practitioner prescribing drugs for animals if the formulary contained them probably did not occur to the draftsman. But even if it had been intended it could not infect the whole Act with invalidity.

Much reliance was placed upon the situation in which approved pharmaceutical chemists stood. It appears from the allegations in the statement of claim that nearly all chemists carrying on business in Australia had applied for approval before the amendments made in the Act and regulations during this year were brought forward. Approval must be granted upon application: s. 9 (1). But the authority of the Director-General to comply with a request by an approved chemist to revoke approval is conferred in permissive language. He "may at the request of an approved pharmaceutical chemist . . . revoke his approval of that pharmaceutical chemist." It is not easy to spell into this language a duty on the part of the Director-General to comply with the request. Accordingly it is claimed that the legislation enables the authorities to hold approved chemists to the performance of the duties imposed upon them by the Act and the regulations as they now stand whether they desire to continue or not. But even if it were not so, no chemist, it is said, could afford to relinquish his position as an approved pharmaceutical chemist, if the medical practitioners are obliged to use the prescribed forms. For his business would, in too great a measure, depend upon supplying the prescribed medicines. The duties of the approved chemist do not appear to me to include an imperative legal obligation to supply prescribed medicines, materials or appliances. But no doubt a refusal to do so might lead to the suspension or withdrawal of the chemist's approval under s. 13 (1). I do not think that s. 23 (*a*) should be construed as enabling the Governor-General in Council to provide that it should be an offence for a chemist to fail to supply prescribed medicines. If it were so construed I should doubt its validity, as I doubt the validity of reg. 22, which purports to impose upon an approved chemist a legal duty, certainly of a rather vague description, to stock drugs. To place such obligations upon chemists seems to go beyond what is incidental to the provision by the Commonwealth of pharmaceutical benefits. But the validity of these provisions, which do not affect the plaintiffs and are severable, cannot be called in question in this suit.

There remain, however, the considerations that drugs, materials or appliances prescribed by a medical practitioner on a Common-

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Dixon J.

wealth form, if in the formulary or addendum cannot be supplied to the customer for a price paid by him; that payment must be claimed from the Commonwealth; and the rates are not within the discretion of the chemist but are fixed by regulation by means of the Pharmaceutical Tariff.

There is some difficulty of interpretation concerning the scope of the prohibition against receiving payment from a person presenting a prescription on a Commonwealth form signed by a medical practitioner. The difficulty arises from the drafting device adopted consisting of the use in the body of the Act of the words supply, obtain and receive and of the making of a general provision that such words shall be read as a reference to the supply, obtaining or receipt of the pharmaceutical benefit in accordance with the Act: s. 4 (2). The result of this is that a payment from the Commonwealth cannot be claimed by the chemist unless the medicine has been supplied in accordance with the Act and that means a regular prescription on the proper form in duplicate and a supply at or from the premises of the chemist in respect of which he has been approved. Does it follow that if there is a departure from any of these requirements he can charge the customer and at a price not fixed by the Pharmaceutical Tariff? That depends on s. 7 (3) and the application of s. 4 (2) to the word "supply" where it occurs in s. 7 (3). I am disposed to think the answer is in the affirmative. Clearly enough s. 8 is limited throughout by the qualification expressed in s. 4 (2), notwithstanding that specific conditions or requirements are expressed in s. 8 itself. Accordingly, it appears to me that if the conditions imposed by s. 8 or any other relevant part of the Act are not complied with the person seeking the "pharmaceutical benefit" has no right to its free supply under the Act and may purchase the medicine or the material or appliance whether from an approved chemist or elsewhere. But these are minor matters and have small effect upon the situation of the pharmaceutical chemist as stated above. It is said that his situation involves a degree of compulsion upon him which goes beyond the power to legislate for providing pharmaceutical benefits and also that it amounts to an acquisition of property from him upon terms that are not just.

These are contentions that, for clearness at all events, require separate consideration. The first of them depends, I think, upon a conception of the power which excludes the possibility of a law being validly made thereunder if its operation is such as to create a situation of economic, business or practical pressure which constrains a man to act in a way desired by the legislature. This

seems to me an indefinite, not to say slippery, conception, and one that has no clear connection with the question whether the legislation constitutes a law for the provision by the Commonwealth of pharmaceutical benefits. Even if, contrary to the view I have expressed, the words " but not so as to authorize any form of civil conscription " applied to the provision of pharmaceutical benefits, it would be difficult to say that the chemist was subjected to a form of civil conscription. He can refuse to supply a prescription. He can supply it from other premises. He is an approved chemist because he applied for approval. I am not impressed by the suggestion that chemists sought approval under a scheme which has since been materially changed so that a chemist may say *non haec in foedera veni*. The amendments in the Act with one exception work no material alteration of the scheme or plan of 1947 and the amendments of the regulations do not do so unless the enlargement of the ambit of the formulary be considered material. The exception is the introduction of s. 7A. But if this section proved effective, the result upon the chemist would be no more than if the medical practitioners had voluntarily used the forms. That the chemists must have contemplated as a possibility when they sought approval. Any full exercise of the power to legislate to provide pharmaceutical benefits must mean either the use of existing pharmaceutical chemists as suppliers of medicines or the use of new agencies. It is difficult to see why the economic consequences upon chemists should put it beyond power. The dilemma which the legislative choice of the first of these alternatives presented to chemists of either coming in or staying out of the scheme does not seem to me to be civil conscription or to place the measure outside the power to provide pharmaceutical benefits.

The contention that s. 51 (xxxi.) of the Constitution invalidates the legislation because it amounts to or includes an acquisition of property upon terms that are not just cannot, in my opinion, be supported. It depends upon the view that under the Act the prices of drugs or medicines supplied by the chemists in pursuance of the legislation are fixed by the executive and may be so fixed quite arbitrarily. I think that we must treat prices fixed by the regulations as fixed by law. It is not like an attempt to authorize an assessment by the executive or an agent of the executive of the compensation for or value of property which may be compulsorily taken. If therefore the power of making laws with respect to the acquisition of property which s. 51 (xxxi.) confers is needed to support the provisions concerning the supply of drugs prescribed, then I think the matter must be dealt with in much the same way

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Dixon J.

as if the Parliament itself were to provide by statute for the acquisition of property and at the same time to name the compensation in the statute. In such a case, I apprehend, the validity of the statute would depend on the fairness in fact of the compensation named. It would be incumbent upon the Court to determine as a matter of fact whether the sum named afforded just terms.

Here there has been no attempt to show that the prices the Pharmaceutical Tariff would provide would in fact be inadequate or unfair. But however that may be I do not think that the provisions of the legislation governing the supply of prescribed medicines, materials or appliances by chemists amount to a law with respect to the acquisition of property within the meaning of s. 51 (xxxi.). The view has been expressed that s. 51 (xxxi.) covers voluntary acquisition. The view has also been expressed that it covers acquisitions of property authorized by Federal law even although the property is not acquired by the Commonwealth (*McClintock* v. *The Commonwealth* (1)). No doubt if you combine these views a dialectical argument may be constructed to support the conclusion that as the acquisition of the medicine from the chemist by the customer is authorized by Commonwealth law s. 51 (xxxi.) must apply. But it is a synthetic argument, and in my opinion is unreal. The first view means that an acquisition by the Commonwealth may be authorized under the power, whether the acquisition be voluntary or compulsory. The second view means that a compulsory acquisition under Federal law for a purpose in respect of which the Parliament has the power to make laws must be referred to s. 51 (xxxi.) and must comply with the condition concerning just terms. There is here no compulsory acquisition by the customer of the drugs he obtains from the chemist when he presents a medical prescription. The chemist is legally free to supply them or not as he pleases. I do not think that the risk he may run of his approval being revoked if he refuses, or the business consequences of the revocation, can make the acquisition compulsory. Its legal character is a voluntary sale. The protection which s. 51 (xxxi.) gives to the owner of property is wide. It cannot be broken down or avoided by indirect means. But it is a protection to property and not to the general commercial and economic position occupied by traders. The essence of a chemist's relation to the plan is that, as a trader, he must decide whether at the prices fixed by the Commonwealth he will or will not supply a commodity which he buys and sells, the law having brought about a situation in which it is likely that there will be little or no other

(1) (1947) 75 C.L.R. 1.

trade for him in that commodity. If the prices are too low he may suffer in his trade, but that is not within the protection of s. 51 (xxxi.). But it does not appear to me that it is a case of taking his property from him against his will without just compensation.

So far I have dealt with the legislation as it governs the supply by pharmaceutical chemists of medicines and materials and appliances. I have done so because that is the principal concern of the Act. But there are provisions dealing with the supply of drugs in hospitals and by medical practitioners in districts where there is no chemist and for special arrangements for isolated areas and more generally. I do not refer to the particular sections and clauses relating to the dispensaries of friendly societies and the like because they do not seem to be more than special cases of the supply by pharmaceutical chemists.

Some consideration, however, must be given to the supply of pharmaceutical benefits by medical practitioners and to the special arrangements affecting them and for the supply of pharmaceutical benefits in hospitals, although I think that the invalidity of those provisions could not bring down the rest of the Act and regulations.

As to the first, s. 11 provides that where there is no approved pharmaceutical chemist in a particular area, the Director-General may approve a medical practitioner practising in the area for the purpose of supplying pharmaceutical benefits. It then provides that they shall be supplied by him in accordance with the regulations. Two points arise on the section. The first is whether the Director-General may fix upon a medical practitioner and approve him without his consent and against his will. I think not. The provision is perhaps defectively drawn but I think the word "approve" implies that the function for which he is to be approved is one that the medical practitioner seeks to fulfil. The second point is whether a duty to supply the medicines &c. is imposed upon the approved practitioner. Again I think not. The word "shall" is directed not to the words "be supplied" but to the phrase "in accordance with such conditions as are prescribed." It would be a great burden to impose upon a medical practitioner in a remote area if he were placed under a legal duty of having available for supply everything that might ultimately be covered by the formulary and the addendum. Section 15 (1) is a somewhat indefinitely worded provision authorizing the Minister to make special arrangements to provide that an adequate service in lieu of all or any of the benefits provided by the Act would be available in isolated areas or under special conditions. Sub-section (2) says that the provisions of any special arrangements made in accordance with sub-s. (1)

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Dixon J.

shall have effect notwithstanding any provisions of the Act inconsistent therewith. It is suggested that this gives the Minister an anomalous coercive authority exerciseable by making "arrangements," an authority bounded only by the subject matter. I think that this misconstrues the provision. The Minister, in my opinion, is given no coercive powers. He must make arrangements which are voluntary in character, but he is not bound to conform to the general requirements of the Act and his "arrangements" may be, therefore, inconsistent with the plan laid down elsewhere in the Act. It is plain on the face of s. 16 that only contractual arrangements are contemplated by that particular provision. I see no reason to doubt its validity.

The Act distinguishes between public and private hospitals. A patient occupying a bed in a public ward in a public hospital is excepted from persons entitled to pharmaceutical benefits: s. 7 (1). The power to make regulations includes authority to prescribe the hospitals or the classes of hospitals which shall be deemed to be public hospitals for the purpose of the Act: s. 23 (*d*). The governing body of a public hospital and the proprietor of a private hospital are called hospital authorities. A Minister of a State may be declared the governing body of the public hospitals of the State: s. 4 (1) and (3). A hospital authority may apply for approval to supply pharmaceutical benefits to patients receiving treatment in or at the hospital of which it is the governing body or proprietor. The application must say who will dispense or supply the pharmaceutical benefits on behalf of the hospital: s. 12. The approved hospital authority is then entitled to payment from the Commonwealth in accordance with the regulations in respect of the supply of pharmaceutical benefits to the patients but no payment is to be made under this provision in respect of a patient occupying a bed in a public ward in a public hospital: s. 14 (3) and (4). The approved hospital authority takes the place of the approved pharmaceutical chemist. It supplies the medicines, materials and appliances covered by the formulary and addendum and claims payment from the Commonwealth. But in the arrangements for payment a distinction exists between public hospitals and private or it would be better to say hospitals not defined as public. Subject to the satisfaction of the Director-General as to the adequacy of the provision of pharmaceutical benefits by a public hospital, the approved authority of the hospital is to receive payment fixed on a basis "which will result in payments covering as nearly as practicable the cost to approved public hospitals in the State concerned of supplying the pharmaceutical benefits." It is fixed by the Federal

Treasurer after consultation with the State Treasurer: reg. 32. Since the payment is made under such an arrangement, the regulations provide that a medical practitioner shall not write a prescription in respect of the treatment of a person in or at an approved public hospital upon a prescription form supplied by the Commonwealth: reg. 33. In other hospitals the medical practitioner must, according to s. 7A, write prescriptions for formulary medicines and materials and appliances on Commonwealth forms. A prescription must be presented to an approved hospital authority if he is the proprietor of a private hospital: reg. 12. Putting aside s. 7A, there is not in my opinion any ground apart from those already dealt with for saying these provisions fall outside the power to make laws with respect to the provision of pharmaceutical benefits. But it is only in public hospitals that the hospital medical attendants need not use Commonwealth forms for medicines and materials and appliances listed in the formulary or addendum. Curiously enough "public hospital" is defined in a way that excludes hospitals conducted by the States themselves. The definition is made by the regulations pursuant to the power already mentioned. To be a public hospital the institution must be in receipt of a grant for maintenance from a State and must be certified to be a public hospital by the State Minister concerned: reg. 2 (3). It is pointed out for the State of Victoria intervening, that State mental hospitals, gaol hospitals, police hospitals and other State hospitals, sanatoria and clinics do not "receive grants for maintenance" and must therefore fall outside the definition. Consequently the medical officers are not relieved from the necessity, if s. 7A is valid, of prescribing upon Commonwealth forms, if they prescribe anything falling within the formulary or the addendum. In any case even if the medical officers of such institutions were relieved by the regulations from so doing, it would remain true that by the terms of s. 7A of the Act they were required so to use Commonwealth forms, and only by the regulation-making power were they excepted. I agree that if the effect of the provisions is to require State medical officers in the course of their State duties to use Commonwealth forms, although the State institutions in which they act are not approved and no payment is or could be claimed from the Commonwealth for the medicines the State provides for the patient, the provisions would probably go too far and so *pro tanto* would exceed power. The effect as an interference with the conduct of the institution is perhaps exaggerated. The point seems to be, however, that in its application to the circumstances suggested the imposition upon the State medical officers of an obligation to conform to s. 7A

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Dixon J.

and reg. 11 is not connected with the provision of benefits. But again I cannot see how such an excess of power would destroy the whole Act.

For the foregoing reasons I think that, excluding, for separate consideration, s. 7A and the provisions of the regulations affecting the mode of prescribing what is covered by the formulary and addendum and the fulfilment of the prescription, the legislation, in all respects material to this case, is valid.

The whole case in my opinion is reduced to the question whether s. 7A, considered with the provisions of the regulations I have mentioned, is valid. This question may be divided into two. First is it a law with respect to providing pharmaceutical benefits or, perhaps, medical services? Second does it involve a form of civil conscription?

I have stated the first question without distinguishing between the principal power contained in s. 51 (xxiiiA.) and the incidental power. I have done so because I have no doubt that the principal power includes within it everything which is incidental to the subject matter. "It is a fundamental principle of the Constitution that everything necessary to the exercise of a power is included in the grant of a power. Everything necessary to the effective exercise of a power of legislation must, therefore, be taken to be conferred by the Constitution with that power"—per *O'Connor* J., (*Baxter* v. *Ah Way* (1)). It goes further than "necessary"; "things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, prima facie, to follow from the authority for effectuating the main purpose by proper and general means"—per Lord *Selborne*, (*Small* v. *Smith* (2)). Here we are concerned with what is incidental to the subject matter rather than with some matter which arises in or attends the execution of the power of legislation over the subject matter and so would itself be a subject of legislative power under s. 51 (xxxix.). The distinction is stated in *Le Mesurier* v. *Connor* (3).

It is I think, within the scope of the power with respect to the provision of pharmaceutical benefits, understood according to these principles, to prescribe conditions governing the right to obtain medicines from chemists at the cost of the Commonwealth and the right of the chemist to obtain payment from the Commonwealth, the procedure to be followed, including the documentation and records, and the machinery for administering the plan. Thus it is

(1) (1909) 8 C.L.R. 626, at p. 637.
(2) (1884) 10 App. Cas. 119, at p. 129.
(3) (1929) 42 C.L.R., at p. 497.

within power to make a medical prescription indispensable to the right to obtain free medicines. It is within it to provide, for administrative convenience, that a prescription should not suffice unless written upon an official form. It is within it to make up and furnish to medical practitioners and chemists a list of uncompounded medicines and formulae for medicinal compounds. To do so serves, I take it, the purposes of limiting the medicines to be supplied at government cost, of providing a system of references for the use of the medical practitioner, the chemist and administrative officers and of facilitating the preparation and use of a pharmaceutical tariff. It is more doubtful whether it is within the scope of the power to provide, as reg. 31 (2) in effect does, that if a particular trade mark, brand, make or proprietary equivalent of something contained in the formulary is prescribed, the chemist shall not be bound to supply the pharmaceutical benefit in that form and if he does he shall be paid no more than the rate of the Pharmaceutical Tariff. This, I think, exceeds power if and in so far as it purports to relieve the chemist of responsibility to the patient for supplying something which is not prescribed, if on any medical ground it can be distinguished from what is prescribed. Whether it does so is a question which, I presume, must depend upon the possible operation the clause may have upon prescriptions for particular compounds now specified in the formulary scheduled to the regulations. It is a question that cannot be decided without information and explanation, which are beyond the limits of judicial notice. It is a matter which it is neither possible nor necessary to decide at present. It is not necessary to do so because it does not affect the validity of the main provisions.

Then comes the last legislative step, the step taken by the *Pharmaceutical Benefits Acts* 1949, of imposing upon medical practitioners the obligation of using a Commonwealth form if they prescribe anything in the formulary. Why is not this further legislative step also a law with respect to the providing of pharmaceutical benefits ? I find it impossible to say that it is not such a law. The duty it purports to impose of writing a prescription for a medicine in the formulary not otherwise than on a prescription form supplied by the Commonwealth touches directly the plan for providing pharmaceutical benefits. It is nothing to the point that some other plan might have been adopted. Doubtless the legislature might have reconsidered the question of the necessity of a form of prescription. It might have decided that any written prescription would suffice. But it took the opposite view.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

DIXON J.

The question whether s. 7A is a law with respect to the subject matter is one of relevance not of policy. Since the intended operation of the section is to secure the use of the machinery and procedure which, *ex hypothesi*, has been constitutionally established, it is not easy to see how it could be said to go beyond the subject matter. Possibly in the absence of sub-s. (2) (*a*) an argument might have been available. That argument would have been that there was no means by which the "benefit" could be renounced or avoided, and to give a man what he wishes to disclaim is outside the power. To exclude the possibility of a man buying for himself his own medicine, doubtless would be beyond the power. Indeed, it has been argued that sub-s. (2) (*a*) does not suffice to preserve to persons of tender years or of insufficient mental capacity or enfeebled by illness or age, the privilege of rejecting the "pharmaceutical" benefit and therefore sub-s. (1) goes too far. In such a case the prescription in respect of that person must have been written at the request of someone and the subsection allows the latter to request that it shall not be written on a Commonwealth form. In any event, the argument that to provide medicaments for a person in such a condition is not to provide a pharmaceutical benefit is untenable.

It is suggested that reg. 11A might be repealed and that then s. 7A would make possible an attempt to control the conduct of any given medical practitioner by withholding from him a supply of forms so that he could not carry on his practice. This suggestion overlooks the plain implication of s. 7A namely, that its operation is conditional upon a supply of forms being made available by the Commonwealth.

There remains the final question. Does s. 7A in itself or with the regulations amount to a form of civil conscription? In the consideration of this difficult question, it is important to be clear what duty the medical man is required to perform when it arises and what is its essential nature. The duty is to use a government form in prescribing: to write it in duplicate: to indicate what he prescribes by its title in the formulary, adding any permitted variation he thinks proper: to draw a line: to date the prescription and to sign it. The duty only arises when the practitioner has decided to prescribe. He is placed under no duty to attend the patient or to prescribe. Further, it is only when he decides upon a prescription that is in the formulary, with or without a variation described in reg. 4 (3), that the duty attaches. The formulary and the permitted variations cover a wide field and doubtless it would not be possible to carry on practice without frequently using

formulary prescriptions. But it is the fact that a prescription for what is not contained in the formulary, or I think for a variation which is not "permitted" of what is contained therein, neither need nor ought to be written on the Commonwealth form.

Now as to the essential nature of this duty. It serves the patient only in respect of his pocket. It provides him with a document enabling him to obtain the medicine free. It serves the Commonwealth in respect of its administration of the scheme. Prescribing is a part of medical service. The service is to the patient. There is no compulsion to render this service. But there is a compulsion as to the formalities to be observed when the prescription is set down as a direction for the chemist. In the course of a day's practice by a busy medical man, these formalities would, no doubt, be repeated many times. The necessity of indicating what he prescribes by its title in the formulary and of using a Commonwealth prescription form for formulary medicines would cast upon him the burden of turning up the formulary until he acquired a sufficient familiarity with its contents.

That being the extent and nature of the obligation sought to be placed upon him it is perhaps desirable to pause to inquire whether it amounts to a compulsory medical service. The point of this inquiry, stated in that form, lies in the circumstance that the bracketed words in s. 51 (xxiiiA.) qualify only medical and dental services. In strict accuracy I think that it is not a medical service that is made compulsory. It is a procedure in performing an incident of medical service that is made compulsory and it is done in order to effect a non-medical purpose. The power under which it is done is in my opinion not to legislate with respect to providing medical services but with respect to providing pharmaceutical benefits. But this perhaps is not decisive because if it amounts to a form of civil conscription there may be an implication against imposing it even under the power with respect to the provision of pharmaceutical benefits.

The difficulty I have in regarding the foregoing obligations as amounting to a form of civil conscription consists in their incidental character. They comprise only the pursuit of an appointed procedure, the observance of formalities: the adherence to a terminology or mode of indication. The burden of these things may be great. They may cause much embarrassment and involve a restriction upon the freedom or flexibility, and an impairment of the facility, with which prescriptions are selected or composed, and written. But however burdensome the consequences may prove,

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Dixon J.

it is still true that what is required is adherence to a specific course in a particular act incidental to medical practice. Now the expression "civil conscription" cannot be equivalent simply to compulsion. If the qualification consisted in the words "but not so as to authorize any form of compulsion," there could be little doubt that s. 7A would fall within it.

It is difficult indeed to say with confidence what is essential to the meaning of the expression "any form of civil conscription," to ascribe to the expression any definite requirement as part of its connotation. But compulsion to serve seems to be inherent in the notion conveyed by the words. No doubt the service may be irregular or intermittent. A duty to give medical attention to outpatients at a hospital for two hours once a fortnight if imposed by law would no doubt be a form of civil conscription. It need not involve the relation of employer and employee. A law imposing an obligation to perform medical services for patients at a practitioner's own rooms would doubtless be bad as involving a form of civil conscription. But I cannot escape the conviction that a wide distinction exists between on the one hand a regulation of the manner in which an incident of medical practice is carried out, if and when it is done, and on the other hand the compulsion to serve medically or to render medical services. The former does not appear to me within the conception; the latter does. Section 7A and reg. 11 amount to no more than a regulation of the manner in which prescriptions shall be given, if and when they are given, that is prescriptions for anything on the list. The end in view is not medical but financial and administrative. There is no compulsion to serve as a medical man, to attend patients, to render medical services to patients, or to act in any other medical capacity, whether regularly or occasionally, over a period of time, however short, or intermittently.

I am unable to agree that it is enough that what is made obligatory is an act in the course of medical practice. The law which makes it an offence to write a prescription without dating and signing it and placing thereon the address of the medical practitioner could hardly be called a form of civil conscription and I do not see that the purpose to be served would make any difference. I do not underrate the importance and the extent of the words "any form," but it must be a form of civil conscription. In my opinion that vague expression is not satisfied by what is required by s. 7A and reg. 11. In my opinion s. 7A is valid. I think too that reg. 11 is valid. I am of opinion that the demurrer should be allowed.

McTIERNAN J. The demurrer to the statement of claim is founded upon s. 51 (xxiiiA.) of the Constitution of the Commonwealth. The subjects of this paragraph were brought within the range of Commonwealth power under the name of "social services." This appears from the title of the Act namely "*Constitution Alteration* (*Social Services*) 1946" which inserted par. (xxiiiA.) in s. 51 of the Constitution. Section 51 (xxiiiA.) gives power to the Parliament to legislate with respect to the provision of various matters, including "benefits." One of the subjects of this legislative power is the provision of pharmaceutical benefits. The power to legislate with respect to this subject is particularly relied upon to support the demurrer. It is necessary to examine what is meant by pharmaceutical benefits.

The material aid given pursuant to a scheme to provide for human wants is commonly described by the word "benefit." When this word is applied to that subject matter it signifies a pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security: the word is also applied to such aids made available through a benefit society to members or their dependants. The word "benefits" in par. (xxiiiA.) has a corresponding or similar meaning.

The words "the provision" with which s. 51 (xxiiiA.) begins, the nature of the assistance which may be provided under this new legislative power, the classification of the items as social services made by the Act which inserted the power in the Constitution, raise, in my opinion, a necessary implication that the words "the provision" mean the provision by the Commonwealth. Further, in my opinion, the words "the provision," would not justify a law providing for the compulsory receipt of any payment, benefit or service. The present Act, however, makes the receipt of a pharmaceutical benefit optional. The power of the Commonwealth is not limited to the provision of social services to the extent only that a gap is left by State or private action. The power does not extend to the extrusion of a State or any private person or association from any field of charity or welfare work. The present Act of course does not attempt to do so. There may be a question which it would be necessary to resolve under s. 109 of the Constitution, if a Commonwealth law within s. 51 (xxiiiA.) and a State law pursued similar plans of social welfare.

Although the intention of par. (xxiiiA.) is to give the Commonwealth power to undertake certain plans of social welfare or security, the power is more than facultative. It is within the limits of the

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

McTiernan J.

subject matter, a plenary legislative power. Subject to the condition respecting any form of civil conscription, which at any rate applies to the provision by the Commonwealth of either medical or dental services, any compulsory or non-compulsory law may be made if relevant to the subject matter or if it is incidental to the execution of the power : in the latter case the law would be justified by s. 51 (xxxix.).

The Commonwealth Parliament derives lawful authority from par. (xxiiiA.) to appropriate the revenue to the purposes mentioned in the paragraph. These are plainly " purposes of the Commonwealth " upon any view of the scope of that phrase in s. 81 of the Constitution. The power vested by par. (xxiiiA.) covers a wider field than matters incidental to the execution of the power to appropriate revenue for those purposes. It is a plenary legislative power to make laws with respect to the provision by the Commonwealth of any of the matters specified in the paragraph.

The grant of legislative power made by the insertion of par. (xxiiiA.) in s. 51 of the Constitution includes a power which the Court in *Attorney-General (Vict.)* v. *The Commonwealth* (1) said it was necessary for Parliament to have to enable it to pass the *Pharmaceutical Benefits Act* 1944.

The plan pursued by that Act and the present Act is that the Commonwealth pays for the medicine obtained at a pharmaceutical chemist's shop by any person who is in need of it. The payment by the Commonwealth for the medicine is action within the scope of the words " the provision of pharmaceutical benefits ".

The provisions of the present Act and Regulations have been expounded in preceding reasons for judgment. It is unnecessary to repeat them. All these provisions are relevant and appropriate to the plan the legislature has adopted to provide pharmaceutical benefits. Each of these provisions may be justified either by the power to make laws with respect to the provision of pharmaceutical benefits or the power in s. 51 (xxxix.) to make laws with respect to matters incidental to the execution of the former power. This conclusion follows inevitably from the reasons given in *Attorney-General (Vict.)* v. *The Commonwealth* (1). It will be necessary, however, to refer specially to s. 7A of the present Act.

The plan of the Act is that the medicines, materials and appliances mentioned in s. 6 should be the subjects of the benefits provided by the Act. These goods are described in s. 6 as pharmaceutical benefits. They are such in a secondary sense. The benefit consists in obtaining any of them without cost. In order to obtain it as a

(1) (1945) 71 C.L.R. 237.

benefit it must be obtained in accordance with the Act and the regulations.

The power being plenary legislative power, there is an end to the objection that only eleemosynary provision in harmony with State laws and administration is authorized. To be a patient in a State hospital or an inmate of a State institution is not a constitutional obstacle to the receipt of Commonwealth pharmaceutical benefits.

Section 6 cannot be held to be invalid because the Parliament has not deferred to State laws applying to goods ordinarily obtained at pharmacies or dispensaries.

This section ought not to be construed as a power to draw up a formulary composed of any goods whatsoever regardless of the consideration that to make them available in accordance with the Act would not be to provide " a pharmaceutical benefit." The rule of interpretation is to read the section subject to the constitutional power. It does not give authority to include anything which may not be provided by way of a benefit which is in reality a " pharmaceutical benefit." " Materials and appliances " are mentioned in s. 6 (*b*). This classification is adopted for goods which are not medicines. They are goods which have a therapeutic value for human beings. They are not necessarily outside the broad class of pharmaceutical goods. It must be remembered that there is a condition in the Act that nothing can be obtained by way of a pharmaceutical benefit except upon the prescription of a medical practitioner.

The question which it is necessary to consider is whether any material or appliance, something not medicine in the ordinary meaning of the word, but such as a doctor would prescribe for the treatment of a human being, and is obtainable at a chemist's shop or a dispensary, is not capable of being provided as a pharmaceutical benefit for the person for whom it is prescribed, because of the limitation imposed by the word " pharmaceutical." Going upon common experience, this question cannot be answered absolutely in the affirmative. Section 6 (1) (*b*) should be construed to refer to materials and appliances which may be provided validly under the power. It extends also to the provision of sickness benefits.

The most controversial provisions of the Act and the regulations from the constitutional point of view are s. 7A and reg. 11. It is argued that these provisions are beyond the powers affirmatively given by s. 51 (xxiiiA.) and also collide with the condition withholding power to authorize any form of civil conscription.

This condition cannot by reason of its place in par. (xxiiiA.) apply to a law providing " benefits to students " and " family allowances". Its place in the paragraph raises the question whether it applies

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

McTiernan J.

only to the provision of medical and dental services and nothing else or to the provision of any matter in the paragraph which precedes the condition. They are maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services. It would seem odd to say that there is power to make a law with respect to the provision of maternity allowances "but not so as to authorize any form of civil conscription." And if the condition applies to that subject matter it would appear to be odd that it is not made to apply to "family allowances." Clearly it does not apply to that subject matter. If the construction that the condition applies only to the provision of medical and dental services is not adopted, the only alternative construction is that it applies to every subject matter beginning with maternity allowances down to medical services. This alternative construction would bring the idea of conscription into association with matters with which it is not naturally or logically connected. I think that the key to the interpretation of the paragraph is that the idea of conscription cannot naturally be associated with the provision of anything in the paragraph except the services which are mentioned; they are medical and dental services. The condition immediately follows the words "medical and dental services." In my opinion it should not be annexed to anything before the word "medical." There is no comma between dental services and the first of the brackets enclosing the condition: there is a comma at the end of the second bracket. The words "medical and dental services (but not so as to authorize any form of civil conscription)" are a separate branch of the legislative power conferred by the paragraph. No other branch of the power is qualified by the condition. In this view the Parliament is equipped with power to legislate with respect to the provision of pharmaceutical benefits unfettered by the condition with respect to conscription.

"The provision" in s. 51 (xxiiiA.) means the provision by the Commonwealth. The condition comes into play in connection with the provision of medical and dental services by the Commonwealth. The protection of the condition is not needed in connection with the provision of medical and dental services by anybody else; because the legislative power given by s. 51 (xxiiiA.) does not extend to that field. By the *Pharmaceutical Benefits Act* 1947-1949 the Commonwealth does not provide any medical service unless it does so under ss. 15 and 16. It is clear from the terms of these sections that they depend upon the making of voluntary arrangements: consequently the condition respecting civil conscription does not affect their

validity. But as the general plan of the Act does not include the provision by the Commonwealth of any medical service, the plan cannot collide with this condition at any point.

The provisions of s. 8 relating to the presentation of a prescription written and signed by a medical practitioner are clearly within power. But if medical practitioners were free to write prescriptions on any paper or in any form or manner they pleased it is obvious, having regard to the large number of prescriptions which would be presented to pharmaceutical chemists throughout the Commonwealth, that the administration of the present plan would involve great difficulties: because it is necessary in order to carry out the present plan for the officers of the Commonwealth to examine the prescriptions upon which the chemists supplied the goods for which they claim payment: the prescription is the chemist's title to payment. Its form is one of the concomitants of the plan. The compulsory direction which is contained in s. 7A is therefore within the power to legislate with respect to the provision of pharmaceutical benefits.

Section 7A would, however, be valid if, contrary to the view already expressed in these reasons for judgment, the condition with respect to civil conscription applies to the provision of pharmaceutical benefits.

The word "conscription" standing by itself generally means military conscription. The term "conscription" does not refer to the compulsion of soldiers to serve but to the form employed to compel civilians to be soldiers. The volunteer is bound to obey orders. But volunteers and conscripts, although equally bound to obey orders, are different classes. Conscription is not equivalent to compulsion. It means not the compulsion to serve but the form employed by the State to place a person under a duty to serve. To compel a civilian in time of war to darken the windows of his house is not to conscript him. It is not conscription to require him to fill in and sign a census return giving information required by the Government for defence purposes. The words "civil conscription" mean conscription for civil purposes. The words "any form" do not extend the meaning of conscription beyond its ordinary meaning. The "form" must be a form of conscription. Any form of civil conscription does not mean any form of compulsion or control of conduct. The condition in par. (xxiiiA.) with respect to civil conscription is aimed at the passing of a law which by any form conscribes a person into the service of the Commonwealth. Practical necessity or moral duty is not conscription. In war time a citizen is under the practical necessity and the moral duty of giving

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

McTiernan J.

aid to his country. If he acts under such compulsion he is nevertheless a volunteer.

The *Pharmaceutical Benefits Act* does not by any form of law call any doctor to serve the Commonwealth: it does not attach any medical practitioner to the service of the Commonwealth. No doctor is any less a private practitioner than he was immediately before the Act was passed. In the circumstances in which s. 7A applies, the doctor is directed to write a prescription in the manner prescribed by the Act. The doctor is legally free to decline to write any prescription if he objects to writing it in that form. If he observes the direction the writing of the prescription is done in the course of his private practice. Compliance with the direction does not in any degree change his status from that of private practitioner to Commonwealth servant. A State law commanding a doctor to sign a prescription or to date it would not engage the doctor in the service of the State. It does not impose a form of conscription. Section 7A regulates or controls the form in which a prescription written entirely in the course of private practice must be written. The section does not provide for any form of civil conscription.

It is doubtful whether the interest of the plaintiffs entitle them to claim that s. 13 is invalid or that the Act and the regulations operate to acquire from chemists the goods supplied by them to the recipients of pharmaceutical benefits but not upon just terms. Section 13 gives a chemist an appeal to the Supreme Court of a State or Territory against the removal or suspension of his approval. In this action it does not appear to be necessary to pass any opinion on these claims: but it is not to be implied that I have any reason to doubt that s. 13 is valid or that the condition as to just terms is fully observed.

The plan for the provision of pharmaceutical benefits which is embodied in this Act and the regulations, in my opinion, does not overpass the limits of the legislative powers which s. 51 (xxiiiA.) vests in the Parliament and there is no contravention of the condition with respect to civil conscription.

I should allow the demurrer.

WILLIAMS J. The question at issue on this demurrer is whether the *Pharmaceutical Benefits Act* 1947-1949, or alternatively certain sections of and regulations made under this Act, are a valid exercise of the power conferred on the Commonwealth Parliament by s. 51, par. (xxiiiA.) of the Constitution to make laws for the peace, order and good government of the Commonwealth with respect to "The

provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances." This paragraph was inserted in the Constitution pursuant to s. 128 of the Constitution. The proposed law which was submitted to the electors pursuant to this section, approved by the necessary majorities, and assented to on 19th December 1946, was the *Constitution Alteration* (*Social Services*), Act No. 81 of 1946. At the same referendum further proposed laws were submitted to the electors but were not approved by the necessary majorities. One of these proposed laws was the *Constitution Alteration* (*Industrial Employment*) 1946. This proposed to alter s. 51 of the Constitution by inserting after par. (xxxiv.) the following paragraph— " (xxxivA.) Terms and conditions of employment in industry, but not so as to authorize any form of industrial conscription."

The reason for the insertion of the new paragraph (xxiiiA.) in the Constitution is common ground. In *Attorney-General* (*Vict.*) v. *The Commonwealth* (1) the *Pharmaceutical Benefits Act* 1944, the predecessor with an important difference of the present Act, was declared to be invalid by *Latham* C.J., *Rich* J., *Starke* J., *Dixon* J. and myself, *McTiernan* J. dissenting. The power relied upon to support the constitutional validity of this Act was the power of appropriation in s. 81 of the Constitution. This section provides —" All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution." The reasons for judgment in *Attorney-General* (*Vict.*) v. *The Commonwealth* (1) disclosed a division of opinion as to the meaning of the words " for the purposes of the Commonwealth " in s. 81 of the Constitution. *Latham* C.J. and *McTiernan* J. thought that the purposes could be any purposes determined by the Commonwealth Parliament. *Starke* J. thought that the purposes could only be the purposes of the Commonwealth as " an organized political body, with legislative, executive and judicial functions, whatever is incidental thereto, and the status of the Commonwealth as a Federal Government " (2). I was substantially of the same opinion. *Dixon* J. did not find it necessary finally to decide judicially between these two views, but (3) indicated that in the past he had not entertained the view that s. 81 of the

(1) (1945) 71 C.L.R. 237.
(2) (1945) 71 C.L.R., at p. 266.
(3) (1945) 71 C.L.R., at p. 269.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Williams J.

Constitution empowered the Parliament to expend money for any purpose that was for the benefit of the people of the Commonwealth. *Rich* J. was in substantial agreement with the reasons of *Dixon* J., from which it would appear that he also had not in the past entertained this view.

It was therefore likely, if the point arose for decision, that the majority of the Court would hold that the only form of social services upon which the Commonwealth could lawfully expend its moneys were those expressly authorized by the Constitution, that is invalid and old age pensions which are authorized by s. 51 par. (xxiii.), and that the Acts authorizing payments for maternity allowances, child endowment and widows' pensions were invalid.

Accordingly, the main purpose of the alteration of the Constitution now embodied in s. 51 par. (xxiiiA.) was to empower the Commonwealth Parliament to legislate to spend its moneys on a wider range of social services than those authorized by s. 51, par. (xxiii.). The new paragraph is of course plenary in its fullest sense and must, like every other legislative power in the Constitution, be given a wide and liberal interpretation. It contains eleven separate heads of legislative power. These heads may to some extent overlap, but there is no reason why the paragraph, because it is part of the Constitution, should not be construed so as to make it a consistent enactment and to give a meaning if possible to every part of it, *Bank of New South Wales* v. *The Commonwealth* (1). It is important to discover at the outset the heads to which the expression in parenthesis " but not so as to authorize any form of civil conscription " applies. There is a comma after the words " hospital benefits " and a further comma after the words " civil conscription " so that the punctuation tends to confine the expression to the words " medical and dental services," (*Committee of Direction of Fruit Marketing* v. *Collins* (2)) and this is in my opinion the true intent of the paragraph. If the expression was meant to apply to all the preceding words, it would only be natural to expect that it would also be made to apply to the succeeding words " benefits to students and family allowances," because medical and dental services could be provided as part of such benefits and allowances just as readily as they could be provided as part of the preceding allowances and benefits. It would appear therefore that the other heads of legislative power in the new paragraph are not subject to the expression. This may well have been thought to be unnecessary because a legislative power to provide allowances, pensions, endowments, and benefits points strongly to a power which is intended to be exercised

(1) (1948) 76 C.L.R. 1, at pp. 256, 257. (2) (1925) 36 C.L.R. 410, at p. 421.

by the Commonwealth itself providing such allowances &c. in cash or in kind, and not to a power to make or compel a State or some private individual to provide the benefit. But it is unnecessary to express a final opinion because the express inclusion of medical and dental services in the paragraph clearly indicates to my mind that whenever such services are provided whether as services exclusively or in the course of providing some other benefit, the law must not authorize any form of civil conscription of such services.

The expression is a prohibition upon the exercise of the legislative powers of the Commonwealth under par. (xxiiiA.) of the same character as the prohibition contained in ss. 92 and 116 of the Constitution. It invalidates all legislation to which it applies. The words "civil conscription" have no ordinary meaning in the English language. The ordinary meaning of conscription is the compulsory enrolment of men (and now women) for service in the military or naval (and now in the air) forces. But s. 5 (7) (*a*) of the *National Security Act* 1939 provided that nothing in this section should authorize the imposition of . . . any form of industrial conscription, and this was presumably the origin of the same words in the proposed new par. (xxxivA.) and led to the adoption of the words "civil conscription" in par. (xxiiiA.). It would no doubt be a form of industrial conscription to compel persons by law to work in industries whether the industries were carried on by the Commonwealth or its authorities or by the States or their authorities or by private individuals. It would equally be a form of civil conscription of medical or dental services to compel medical practitioners or dentists by law to make their professional services as civilians available to the Commonwealth or its authorities or the States or their authorities or to carry on their professions in particular localities. Conscription as a word of general application would seem to signify compulsory as opposed to voluntary service, so that the words "industrial conscription" would seem naturally to connote compulsory as opposed to voluntary employment in industry, and the expression "civil conscription of medical and dental services" naturally to connote the compulsory as opposed to the voluntary exercise of such services in civil life. Accordingly, in my opinion, the expression invalidates all legislation which compels medical practitioners or dentists to provide any form of medical or dental service.

The crucial question is whether s. 7A of the *Pharmaceutical Benefits Act* 1947-1949 is such a law. The text of the section, which was proclaimed to come into operation on 25th July 1949, is as follows "(1) Subject to this section, a medical practitioner shall not write, in respect of a person entitled to receive pharmaceutical

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Williams J.

benefits, a prescription for—(*a*) an uncompounded medicine the name of which, or a medicinal compound the formula of which, is contained, or is deemed to be included in the Commonwealth Pharmaceutical Formulary ; or (*b*) a material or appliance the name of which is contained in the prescribed addendum to the Commonwealth Pharmaceutical Formulary, otherwise than on a prescription form supplied by the Commonwealth for the purposes of this Act. Penalty : Fifty pounds. (2) The last preceding subsection shall not apply—(*a*) in any case in which the person in respect of whom, or at whose request, the prescription is written requests the medical practitioner not to write the prescription on a prescription form supplied by the Commonwealth for the purposes of this Act ; or (*b*) in such other cases or circumstances as are prescribed."

As the Attorney-General pointed out, the word " pharmacy " in its ordinary meaning includes the preparation of medicines by pharmacists in accordance with the prescriptions of physicians. This meaning will be found in dictionaries and decided cases, some of which are cited in *Unger* v. *Mason* (1). The word has however particular reference to the art or business of compounding and preparing medicines, and the adjective " pharmaceutical " has become descriptive of chemists who are skilled in such art with the addition of the word " registered " where registration is required under the local law to carry on such a business. Chemists now compound and sell many medicines not prescribed for particular patients by physicians, so that reference in the new paragraph to the provision of pharmaceutical benefits would appear to be particularly applicable to medicaments obtainable in a chemist's shop with or without the prescription of a physician. The inclusion in the definition of " pharmaceutical benefits " in s. 6 of the Act of materials and appliances included in an addendum to the formulary not being uncompounded medicines or medicinal compounds would appear to extend the operation of the Act beyond pharmaceutical benefits and to include sickness benefits, but a prescription on the form supplied by the Commonwealth is just as necessary before a person ordinarily resident in Australia will become entitled to such materials and appliances as it is before he will become entitled to uncompounded medicines or medicinal compounds.

The Acts of 1944 and 1947 did not seek to compel medical practitioners to write prescriptions on Commonwealth forms. They were supplied with copies of the formulary and with forms and requested to use the forms when a pharmaceutical benefit was prescribed. We were told by the Attorney-General that the govern-

(1) (1947) 74 C.L.R. 557, at p. 577.

ment believed that medical practitioners would co-operate voluntarily and that it would not be necessary to use compulsion. It may have been thought that patients would exercise a practical compulsion by urging practitioners to use the forms so that they might become entitled to receive the pharmaceutical benefits. But neither event happened and s. 7A was inserted in the principal Act by Acts Nos. 8 and 26 of 1949 to make the use of the Commonwealth forms compulsory. When a statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act in question (*Redpath* v. *Allan* (1)). Section 7A therefore compels a medical practitioner, who cannot obtain a request to the contrary from the person in respect of whom or at whose request the prescription is written, to write the prescription on the forms supplied by the Commonwealth. The Attorney-General submitted that the section does not compel a medical practitioner to render any medical service, and that its whole effect is to compel a medical practitioner to write the prescription on a particular piece of paper if he decides, in the unfettered exercise of his discretion, that the patient requires treatment which is included in the formulary. It was submitted that the subject matter of the legislation is not the medical service of treating the patient, but merely the question of the use of a document for the particular purpose of enabling the patient to obtain the pharmaceutical benefits at or from the premises of an approved chemist without payment. But this is not in my opinion the true effect of the section. The scheme of the Act is to make the provision of a pharmaceutical benefit conditional upon a medical practitioner prescribing particular treatment, so that in prescribing that treatment the medical practitioner is rendering a medical service to the Commonwealth. He is in effect certifying to the Commonwealth that the patient requires a pharmaceutical benefit within the meaning of the Act. Section 16 of the Act provides that: "The Minister may, on behalf of the Commonwealth, enter into an agreement (on such terms as to remuneration, allowances and otherwise as he thinks fit) with a medical practitioner providing that the services of the medical practitioner shall be available without charge to members of the public for the purpose of furnishing prescriptions for the purposes of this Act." This section describes as a medical service, the service which a practitioner provides when he is compelled by s. 7A to write a prescription on a Commonwealth form. He is compelled to render that service in the course of rendering a contractual service to his patient. But it is a service which forms no part of the implied contract for services

(1) (1872) L.R. 4 P.C. 511, at p. 517.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Williams J.

created by a patient seeking the advice and treatment of a medical practitioner and the medical practitioner examining the patient with a view to giving him advice and treatment. It is a compulsory service to the Commonwealth for the purposes of the Act which is super-imposed upon the contract of the parties. It is a compulsory service whether the obligation is absolute or absolute unless performance is excused by the person in respect of whom or at whose request the prescription is written. And the Attorney-General did not contend, rightly I think, that the constitutional validity of s. 7A (1) was in any way strengthened by the presence of s. 7A (2). When analysed, the submission of the defendants appears to imply that a law only authorizes a form of civil conscription of medical services when it operates directly to compel medical practitioners to work for some civil authority or in some particular locality or for some particular class of patients, and that a law which merely compels medical practitioners to act in some particular manner in the course of or as incidental to the carrying on of their profession does not authorize any form of civil conscription. This submission, if accepted, would mean that medical practitioners could be compelled in the course of their practice to perform all sorts of medical duties as, for instance, to give certificates, keep records, and give information, confidential or otherwise, about the health of their patients provided the certificates &c. were reasonably incidental to the execution of a law with respect to the provision of any of the allowances or benefits specified in the paragraph. In my opinion such a submission unduly narrows the effect of the wide words "any form of" in the expression in parenthesis.

It is to be noted that the Act of 1947 did not repeat s. 22 of the Act of 1944 which provided that a medical practitioner should not write a prescription in accordance with any prescribed form unless he was satisfied, by personal examination of the person in respect of whom the prescription was written, that the pharmaceutical benefit specified in the prescription was necessary for the treatment of that person. In *Attorney-General (Vict.)* v. *The Commonwealth* (1) the Chief Justice said of this section that it "directly controls the conduct of medical practitioners . . . this provision directly and compulsorily operates in relation to medical practitioners by preventing them carrying on their practice as they may be allowed to carry it on under the laws of the State." This was said of course before the insertion of par. (xxiiiA.) in the Constitution. Section 7A of the present Act does not, like s. 22 of the Act of 1944, expressly provide that medical practitioners must make a personal

(1) (1945) 71 C.L.R., at p. 260.

examination of their patient before writing a prescription, but it would be the duty of a medical practitioner at common law to be satisfied that his patient required the pharmaceutical benefit before prescribing it, and a statutory obligation similar to that imposed by s. 22 could be introduced by a regulation made under s. 23 of the present Act which authorizes the Governor-General to make regulations . . . (*b*) making provision in relation to the writing of prescriptions on prescription forms supplied by the Commonwealth for the purposes of the Act. Section 7A of the present Act, like s. 22 of the Act of 1944, "directly controls the conduct of medical practitioners" in carrying on their practice. Such duties as giving certificates, keeping records, and giving information about the health of their patients would all be duties to be performed by a medical practitioner in the course of carrying on his profession as a civilian and a law which compelled him to perform them would, in my opinion, authorize a form of civil conscription of his services. Obviously legislation which infringed the prohibition could not be invalid under s. 51 par. (xxiiiA.) but valid under the incidental power s. 51 par. (xxxix.) of the Constitution. For these reasons I am of opinion that s. 7A is invalid.

Other objections were raised to the validity of the Act but I find it unnecessary to discuss them at this stage of the proceedings. They relate mainly to the position of pharmaceutical chemists under the Act and no chemists are plaintiffs. The plaintiffs are confined to the British Medical Association and certain medical practitioners. If s. 7A is declared to be invalid the rest of the Act, if severable and valid, will operate so far as medical practitioners are concerned on a voluntary basis. Section 11 (1) and 16 relate to medical practitioners. But I do not read s. 11 (1) as authorizing the Director-General to approve a medical practitioner for supplying pharmaceutical benefits against his will, and s. 16 merely authorizes the Minister to make an agreement on behalf of the Commonwealth with a medical practitioner. As at present advised therefore I do not think that the plaintiffs have any sufficient interest to impeach the validity of the rest of the Act.

On the ground that s. 7A is invalid I would overrule the demurrer, which is to the whole of the statement of claim.

WEBB J. The two most important questions that arise are as to (1) the meaning of par. (xxiiiA.) of s. 51 of the Commonwealth Constitution; and (2) the validity of s. 7A of the *Pharmaceutical Benefits Act* 1947-1949.

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Webb J.

As to (1) : in my opinion par. (xxiiiA.) does not empower the Commonwealth Parliament to do more than legislate for the provision by the Commonwealth itself of the allowances, pensions, endowment, benefits and services to which it refers, and the provision may be of money, goods or services, even in the case of "benefits"; but, as regards medical and dental services at least, it does not authorize *any form* of civil conscription. As the paragraph is punctuated the words in brackets excluding civil conscription qualify only "services" and not "benefits." However, the Chief Justice gives strong reasons why the punctuation should be disregarded and the words in brackets held to qualify "benefits"; but I find it unnecessary to decide, and so I do not decide, that they do so. So far as medical services are incidental to the provision of pharmaceutical benefits there is no power to conscript such services, as the incidental power to legislate under par. (xxxix.) of s. 51 cannot be held to exceed the express power given by par. (xxiiiA.). The Constitution states that medical and dental services shall not be conscripted, and that is conclusive for all purposes. I do not understand that, because the State of Victoria was given leave to intervene, it is necessary to decide whether the words in brackets qualify "benefits." At all events I think it is not necessary to do so for determining the rights of the plaintiff Council and doctors.

Then as to the meaning of the words in brackets, it was not submitted that civil conscription meant the enlistment of persons for full-time service. During World War I. "conscription" was employed to designate compulsory military service anywhere, including service overseas; but during World War II. it was used in Commonwealth legislation to describe any compulsory service in the armed forces or in industry. As to "civil conscription," I cannot remember hearing or seeing the term used until I saw it in the proposed law in the terms of par. (xxiiiA.) passed by Parliament and subsequently submitted to the electors under s. 128 of the Commonwealth Constitution. I think the electors would have taken the proposed law to emphasize, in the use of the words "any form," that legislation for the provision of benefits or services of the kind referred to could not authorize compulsory service of any kind, at least in the provision of medical or dental services, either independently or as incidental to pharmaceutical or other benefits, and that compulsion, to any extent or of any nature, whether legal, by the imposition of penalties, or practical, by any other means, direct or indirect, could not be authorized. To require a person to do something which he may lawfully decline

to do but only at the sacrifice of the whole or a substantial part of the means of his livelihood would, I think, be to subject him to practical compulsion amounting to conscription in the case of services required by Parliament to be rendered to the people. If Parliament cannot lawfully do this directly by legal means it cannot lawfully do it indirectly by creating a situation, as distinct from merely taking advantage of one, in which the individual is left no real choice but compliance.

As to (2), the validity of s. 7A: in the *Pharmaceutical Benefits Act* as enacted after the par. (xxiiiA.) became part of the Constitution and before July 1949, there was no compulsion of any kind in respect of medical or dental services; but in July 1949, after the doctors had declined to use the Commonwealth form in writing their prescriptions, and so prevented their patients from obtaining the pharmaceutical benefits, the Act was amended to require, in a new s. 7A, that a doctor should use the Commonwealth form if he prescribed anything in the Commonwealth Pharmaceutical Formulary or the addendum thereto, unless the patient requested otherwise. The penalty for non-compliance was fixed at £50. In this way it was sought to compel the doctors to do something which they were not prepared to do voluntarily. But the learned Attorney-General submitted that a doctor, in putting the prescription on the Commonwealth form instead of on his own paper, would not be performing a medical service; that the medical service would be complete when the doctor made up his mind what to prescribe; and that s. 7A operated on him only as from the time when he proceeded to write the prescription. However, I think that "medical service" in par. (xxiiiA.) is not limited to the exercise of the professional skill required to arrive at a conclusion as to what should be prescribed, but extends to the writing of the prescription, whether on the doctor's paper or on the Commonwealth form. Ordinarily the writing of a prescription is a medical service. Taking the allegations in the statement of claim to be true for the purposes of this demurrer, the position appears to be that, as every person residing in Australia who is not a patient occupying a bed in a public hospital is entitled to the benefits provided by the Act, and the great majority of the people of Australia are likely to want these benefits, the doctors must treat them or lose a considerable part of their practice, if not the whole of it; but if a doctor treats patients to retain his practice, then s. 7A requires him to sign the Commonwealth form and renders him liable to a penalty of £50 if he fails to do so. This, in my opinion, imposes on doctors a compulsory medical service and is a form of civil conscription within

H. C. OF A. 1949.

BRITISH MEDICAL ASSOCIATION v. THE COMMONWEALTH.

Webb J.

the meaning of par. (xxiiiA.). It may well appear that at present the doctor is compelled to do very little in being required to use the Commonwealth form, but if it is conceded that he may be compelled to do this on the ground that it is not the performance of a medical service but merely a method of rendering it, he may also be compelled to do many other things on the same ground, such as attending at certain places during certain hours to write prescriptions for the convenience of patients not confined to their homes. It is for Parliament to stipulate the conditions attaching to its grant of benefits, but not by compelling the doctors, under penalty as for an offence, to sign the required forms or be deprived of practice; otherwise by fines or deprivation of practice the doctors could be controlled to any extent as to their movements and time. Of course patients may be forced by the attitude of the doctors to request that the Commonwealth form be not used; but the compulsion on the doctors remains, although for the time being it is countered by a measure which, however undesirable it may appear, is not unlawful.

To reiterate: if s. 7A had not been enacted a patient requesting a doctor to write a prescription on the Commonwealth form, which involves consulting and consideration of the Commonwealth Pharmaceutical Formulary or its addendum or both, would request a service which only a doctor can render, and which therefore is properly described as a medical service. But when this service is made compulsory by a fine, or loss of practice to avoid the fine, in the case of any patient, with few exceptions, who does not request that the Commonwealth form be not used, then, having regard not only to the extent of the professional work involved but to the almost unlimited number of persons entitled to insist on the service at any time, it becomes, I think, not merely a compulsory service but a form of civil conscription within any meaning that can be given to that expression which, if not quite clear, was certainly intended to be comprehensive. It is civil conscription of doctors as doctors. When Parliament comes between patient and doctor and makes the lawful continuance of their relationship as such depend upon a condition, enforceable by fine, that the doctor shall render the patient a special service, unless that service is waived by the patient, it creates a situation that amounts to a form of civil conscription. This civil conscription can be avoided, without any breach of the law, to the extent that the doctor vacates the field of medicine, which, however, would involve, in many if not most cases, a considerable loss of practice and of income. But it is still civil conscription. Military conscription would not cease to be

such because those liable to it might avoid it by a change of occupation.

To amount to civil conscription it is not necessary that the service be a full-time service, or be rendered as a member of a corps created for the purpose.

I think then that s. 7A is invalid as being contrary to s. 51 (xxiiiA.) of the Commonwealth Constitution; but it is severable.

As to the remaining questions I agree with the judgment of the Chief Justice and have nothing to add.

I would overrule the demurrer.

Demurrer overruled.

Solicitors for the plaintiffs, *Tress, Cocks & Maddox.*

Solicitor for the defendants, *George A. Watson*, Crown Solicitor for the Commonwealth.

Solicitors for the intervenant, *F. G. Menzies*, Crown Solicitor for Victoria, by the Sydney Office *Biddulph & Salenger.*

J. B.